92-241

Supreme Court, U.S.
FILED
AUG 6 1992
OFFICE OF THE CLERK

NUMBER _____

UNITED STATES SUPREME COURT

OCTOBER, 1992 TERM

HELON DENISE CRAWFORD, ET AL.,

PETITIONER

VS.

WILLIAM LEAHY, ET AL.,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

HELON D. CRAWFORD

&

ALAN D. CRAWFORD,

PRO SE

6208 GALLERY STREET

BOWIE, MARYLAND 20720

(301) 464-5050

Question

Subsequent to a medical negligence claim arbitrated pursuant to Maryland's Health Care Malpractice Claims Act, resulting in Mrs. Crawford's rejection of the damages determination only, did the Maryland Courts violate Mrs. Crawford's rights guaranteed to her by the United States Constitution, Fourteenth Amendment, Section 1 and/or adversely impact the goal of the Federal Government to solve the national health care crisis; by causing Mrs. Crawford to also seek judicial review of the unrejected determination of liabilty, even though there was no action in court to nullify the award as to liability, by any party?

LIST OF PARTIES TO THE PROCEEDING

Helon D. Crawford, Petitioner

Alan D. Crawford, Petitioner

William R. Leahy, M.D., Respondent

Neurological Medicine, P.A., Respondent

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REFERENCES TO REPORTS OF THE OPINIONS DELIVERED IN THE CASE BY OTHER COURTS:

The Opinion of the Court of Appeals of Maryland and the denial of the Motion for Reconsideration are not yet reported, but have been provided in the attached appendix at pages A-2 through A-47.

The Court of Appeals of Maryland issued a writ of certioari on it's own motion to the Court of Special Appeals, before argument of the case in that Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Date of judgement or decree sought to be reviewed, and the time of its entry: Opinion by the Maryland Court of Appeals filed on April 9, 1992.

The date of any order respecting a rehearing: Denial of Motion for Reconsideration was filed on May 8, 1992.

The date and terms of any order granting an extension of time within which to petition for writ of certiorari: None.

The statutory provision believed to confer on this Court jurisdiction to review the judgement or decree in question by writ of certiorari: Title 28, United States Code, Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State, deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Health Care Malpractice Claims Act, Maryland Code (1989, 1991 cum. supp.) Section 3-2A-06(a):

Rejection of award or assessment of costs.- A party may reject an award or the assessment of costs under an award for any reason. A notice of rejection must be filed with the Director and the arbitration panel and served on the other paries or their counsel within 30 days after the award is served upon the rejecting party, or, if a timely application for modification or correction has been filed within 10 days after disposistion of the application by the panel, whichever is greater.

STATEMENT OF THE CASE

Appellant Helon D. Crawford was a patient of William Leahy, M.D., and his professional association, Neurological Medicine (collectively, "Dr. Leahy"). Mrs. Crawford who had complained of fainting episodes, was diagnosed and treated with Tegretol, an anti-seizure medication, by Dr. Leahy. Mrs. Crawford and her husband repeatedly notified Dr. Leahy and his office over a period of weeks, of symptoms that preceded Mrs. Crawford's emergency hospitalization for a life threatening and toxic reaction to the drug Tegretol. After three weeks in the Washington Hospital Center and many months of recuperation from burns over her entire body, internal injuries, and other damages, all caused by the adverse reaction to Tegretol,

Mrs. Crawford learned from Dr. Fisher of Johns Hopkins Hospital in Baltimore, that she was not infact suffering a seizure disorder at all, but was merely fainting. Dr. Fisher appropiately and correctly diagnosed Mrs. Crawford's episodes of fainting as simple syncope, after examining her and performing the neccessary tests. Dr. Fisher informed Mrs. Crawford that the most likely cause of her fainting was due to the oral contraceptives that she had been taking. Mrs. Crawford has never experienced another episode of fainting since she discontinued her use of oral contraceptives over six years ago. Mrs. Crawford had also discussed with Dr. Fisher, that she was considering filing a lawsuit against the drug manufacturer. Dr. Fisher explained to Mrs. Crawford that Tegretol was indeed a good drug if

administered and monitored properly and subsequently informed Mrs. Crawford that such a case would not have merit.

Therefore, Mrs. Crawford took Dr. Fisher's advice and elected to file only a claim against Dr. Leahy and his professional organization. Mrs. Crawford and her husband (collectively, "Mrs. Crawford") filed and arbitrated a claim against Dr. Leahy pursuant to the Health Care Malpractice Claims Act, ("the Act"), Maryland Cts. & Jud. Proc. Code 3-2A-01 et seq.(1974,1989 Repl. Vol., 1990 Supp.).The arbitration panel was comprised of three members, a doctor, a public member, and an attorney who served as panel chairman. The panel determined (see Appendix, hereafter referred to as "A", at A-58 through A-60) that Dr.Leahy was liable to Mrs. Crawford, determined that Mrs. Crawford was entitled to

damages in the amount of $37,768 and also determined that Dr. Leahy was responsible for 75% of the administrative costs of arbitration and that Mrs. Crawford was responsible for 25% of the costs. The determinations were rendered on a pre-printed form which compelled the arbitration panel to set forth seperately their determinations as to liability, damages, and costs, as required by the Arbitration Act.[1]

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[1] Section 3-2A-05(e) provides:

> *Determinations.* - The arbitration panel shall first determine the issuee of liability with respect to a claim referred to it. If the arbitration panel determines that the health care provider is not liable to the claimant or claimants

(continued . . .)

Mrs. Crawford filed a timely rejection with the Health Claims Arbitration Office (A-63, A-64) as required by the Act as a condition precedent to judicial review, expressly rejecting the damages determination only

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[1] (...continued)

the award shall be in favor of the health care provider. If the arbitration panel determines that a health care provider is liable to the claimant or claimants, it shall then consider, itemize, assess, and apportion appropiate damages against one or more of the health care providers that it has found to be liable. The award shall itemize by category and amount any damages assessed for incurred medical expenses, rehabilitation costs, and

and so stated "Claimants do not reject the finding of negligence and/or the violation of the standard of care found against the health care providers William Leahy, M.D. and Neurological Medicine, P.A."

> Section 3-2A-06(a) provided: Rejection of award - A party may reject an award for any reason. A notice of rejection must be filed with the Director and the arbitration panel and served on the other parties or their counsel within 30 days after the award is served upon the rejecting party, or,

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[1] *(continued . . .)*

loss of earnings. Damages assessed for any future expenses, costs, and losses shall be itemized seperately.

if a timely application for modification or correction has been filed within 10 days after a disposition of the application by the panel, whichever is greater.[2]

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[2] Section 3-2A-06(a) was subsequently ammended by the Maryland legislature in 1991, to permit rejection of costs, in response to *Central Collection v. Gettes* 321 Md. 671, 584 A.2d 689 (1991), which decided that the assessment of costs under Section 3-2A-06(f) should be treated as a seperate award or awards for the purpose of rejection and judicial review.

Section 3-2A-06(a) as ammended is provided at page 4 herein.

(continued . . .)

Mrs. Crawford then initiated judicial review of the damages determination only, by fileing a timely action to nullify award also expressly limited to rejection of the damages determination only, with the Circuit Court for Prince George's County, Maryland and simultaneously filed a complaint as required by Maryland Rule BY4.

Dr. Leahy did not and has not ever filed a notice of rejection with the Health Claims Arbitration Office in this

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2 (...continued)

(f) *Assessment of costs.* - The award shall include an assessment of costs, including the arbitrators' fees. If there is no panel determination, the panel chairman shall assess costs.

case, nor has he filed an action to nullify a panel determination award in court and he has not filed a complaint in this case.

Section 3-2A-06(b) provides:

> *Action to nullify award*- (1) At or before the time specified in subsection (a) of this section for filing and serving a notice of rejection, the party rejecting the award shall file an action in court to nullify the award and shall file a copy of the action with the Director. Failure to file this action timely in court shall constitute a withdrawal of the notice of rejection. Subject to the provisions of subsection (c) of this section, the procedures applicable to the action including the form and necessary allegations in the initial

pleading shall be governed by the Maryland Rules.

(2) If any party to the proceeding elects to have the case tried by a jury in accordance with the Maryland Rules, it shall be tried by a jury. Otherwise, the case shall be tried by a judge.

(3) The trial date for <u>each rejection of a panel determination</u> [3] shall have precedence over all cases except criminal matters and workmen's compensation appeals. (emphasis added).

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[3] Referring to a party that rejects an award on the merits and an award on costs, the Court of Appeals of Maryland has already recognized:

(continued . . .)

(4) The clerk of the court in which an action is filed under this subsection shall forward a copy of the action to the State Board of Physician Quality Assurance.

Dr. Leahy's only response to the arbitration award against him, was the filing of a motion to strike Mrs. Crawford's notice of her action to nullify award or, in the alternative, for an order requiring "complete rejection" of the arbitration award.

In sum, Dr. Leahy argued that the Act required Mrs. Crawford to reject the liability determination in her favor,

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[3] (continued . . .)

"That party must file two cases, although we see no reason why both cases cannot be pleaded in a single complaint."

as well as the damages determination, even though she was only aggrieved by the inadequacy of the latter. Mrs. Crawford opposed the motion, and she contended that the Act could not be construed to impose upon her the obligation to reject an award that satisfied her. She also argued that the Act could not impose upon her the burden of arguing illogically that the liability finding was "not correct." [4]

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[4] 3-2A-06(d) ("Unless vacated by the court pursuant to subsection (c), the unmodified arbitration award is admissible as evidence in the judicial proceeding. The award shall be presumed to be correct, and the burden is on the party rejecting it to provide that it is not correct.") (emphasis added).

Mrs. Crawford found support for her position within the Act [5] itself, as well as two cases decided by the Maryland Court of Appeals.[6]

After an unrecorded hearing in chambers, the trial court granted Dr. Leahy's motion, by an opinion and order entered March 20, 1990, and it gave Mrs. Crawford leave to file an Amended Complaint. The trial court distinguished *Osheroff* and *Hahn*, supra n.6, and it held that there was no

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[5] See 3-2A-06(a) ("A party may reject an award for any reason.")

[6] See *Osheroff v. Chestnut Lodge, Inc.*, 62 Md. App. 519, 490 A.2d 720, cert. denied, 304 Md. 163, 497 A.2d 1163 (1985) and *Hahn v. Suburban Hospitalization Assoc., Inc.*, 54 Md. App. 685, 461 A.2d 7 (1983).

support in the Act for rejecting the damages assessment only.

Mrs. Crawford subsequently filed an Amended Action to nullify and two Amended Complaints, which Dr. Leahy answered Those pleadings placed in issue the question of liability, Dr. Leahy's affirmative defense of contributory negligence, and damages. The effect of the court's decision, therefore, was to achieve court review of the liability finding against Dr. Leahy, in spite of the fact that he had not followed the statutory prerequisites for challenging that determination. Ten days prior to trial Mrs. Crawford moved for reconsideration of the trial court's earlier opinion and order and requested a trial limited to damages, which the court summarily denied. The court subsequently explained that it had reasoned that:

(a) Mrs. Crawford had the initial burden of proof on liability, which could be satisfied minimally, by only offering the arbitrators'decision into evidence; and (b) once Mrs. Crawford satisfied her burden by doing so, the Act shifted the burden of proof to Dr. Leahy Ultimately, the trial court instructed the jury in accordance with those views [7] (see jury instructions at A-50 to A-52).

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[7] See *Newell v. Richards*, 323 Md. 717, 734, 2594 A.2d 1152, 1160-61 (1991). ("If the claimant is successful before the arbitration panel, the court should not instruct the jury that the burden of proof is on the defendant/ health care provider; the court should instruct the jury that the claimant has the burden of proof

The trial court thus eroneously relieved Mrs. Crawford of the burden to prove by a preponderance of evidence, the question of liability. The trial Court conducted the proceedings by placing Mrs. Crawford in the posistion of defending as plantiff, the liability determination that she was compelled by the Trial Court

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[7] (continued . . .)

and couple that with an instruction that there has been a health claims panel award in favor of the claimant which is presumed correct and that the burden is on the health care provider to prove that it is not correct. Thus the health care provider's burden of proof relates only to an item of evidence, i.e., that the panel award is not, in fact, correct."

to reject, thus causing Mrs. Crawford the unprecedented burden of presenting the defense case as to liability before Dr. Leahy presented his case. On February 1, 1991, after a week long trial, the jury returned its verdict in favor of Dr. Leahy on the question of liability (see jury verdict sheet at A-48 to A-49). Thus the jury's decision pretermitted any determination of the inadequacy of the amount of damages, which was the sole question that Mrs. Crawford intended to be reviewed by the trial court.

Mrs. Crawford timely appealed to the Court of Special Appeals of Maryland from the judgement entered on that special verdict. Prior to argument before the Court of Special Appeals, the Court of Appeals of Maryland, issued a Writ of Certiorari on it's own motion "to consider the important issue raised by

this appeal" (see decision at A-12).

Mrs. Crawford argued that the arbitration panel's determination was comprised of multiple awards and that she should not have been compelled to reject the liabilty finding in her favor. Mrs. Crawford offered as support, a case that was decided by the Maryland Court of Appeals on January 23, 1991, the same day that the trial court denied Mrs. Crawford's motion to reconsider. See *State of Md. Central Collection v. Gettes*, 321 Md. 671, 680 n.3, 584 A.2d 689, 693 n.3 (1991). In that decision, the Maryland Court of Appeals held that a health claims arbitration panel's determination is comprised of multiple awards, at least as to the determination of costs and the determination on the merits. The decision however expressly reserved deciding the question of whether

awards on the merits may be segregated into awards finding liability and awards assessing damages, until the question was squarely presented. The decision also explained that 'We are mindful of Chief Judge Gilbert's dictum for the Court of Special Appeals in *Osheroff v. Chestnut Lodge, Inc.*, 62 Md. App. 519, 523, 490, A.2d 720, 722 (1985): "Once the arbitration process has concluded, any party to the proceeding may, for any reason, reject the panel's determination of liability, damages, or both, and invoke court review."' citing in fact, one of the very same cases that Mrs. Crawford had relied on and presented to the trial court in support of the Act's intent to permit judicial review of only those derminations that were rejected. Mrs. Crawford also noted in her appeal that on April 9th, 1991, the Maryland

legislature promptly codified the holding that an arbitration award is comprised of multiple awards at least to the extent of the merits determination and the arbitration costs determination, without responding to the Maryland Court of Appeals express reservation of the issue regarding seperate awards as to liability and damages, and for which no inference could be drawn from the Maryland legislature's silence on the issue. Mrs. Crawford argued in her appeal that clearly, the legislature agreed that dispute-oriented review advanced the objectives of the Act and that the alternative would saddle the courts, and the parties, with compelled litigation over results with which the parties would otherwise be satisfied, citing the Act of April 9, 1991, ch. 25, Md. Laws 1194-97 (codified as amended 3-2A-06(a) (Supp.

1991)), (see statute involved, page 4 herein) noting that the legislature gave its full imprimatur to the Maryland Court of Appeals rationale.

Mrs. Crawford also presented argument in her appeal that the principles of justiciability require that judicial review be limited to bona fide disputes and that *Gettes* was not distinguishable, insofar as it applies essential principles of adversariness that apply to the instant case. The unitary award theory had been rejected by the Maryland Court of Appeals, because the theory was inconsistent with "principles of justiciability, and particularly with the adversariness requirement for an action in court." *Gettes* 321 Md. at 678, 584 A.2d 689 (md. 1991) at 692. Those principles required the party aggrieved by an adverse panel

decision, to take affirmative steps to overturn it. Ultimately significant for Mrs. Crawfords case, the Maryland Court of Appeals specifically denied that one party's notice of rejection and action to nullify operated to preserve the adversary's aggrievement for court review. Moreover, Mrs. Crawford cited other cases arising under the Act, where both the Maryland Court of Appeals and the Court of Special Appeals effectively acknowledged that an arbitration award is not "one large ball of wax." Id. 584 A.2d 689 (Md.1991), at 695. See, e.g., *Su v. Weaver*, 313 Md. 370, 545 A.2d 692 (1988) (holding that where the panel has decided several distinct issues of liability, the panel should state in the award its conclusion as to each and the jury should be advised of each distinct conclusion. "[T]hat there may

be multiple issues of liability. . . is more consistent with the purpose of the Act." Id. at 380.); *Hahn v. Suburban Hospitalization Assoc., Inc.*, 54 Md. App. 685, 692-94, 461 A.2d 7 (1983) (holding that a plantiff aggrieved by an inadequate damage award does not also bear the burden of proof on liability, where the health care provider has filed a notice of rejection and an action to nullify as to the liability question). Cf. 3-2A-05(e) (requiring seperate determinations of liability and damages, as well as the various components of the damages award). Mrs. Crawford argued that the trial court had erred, therefore, in imposing the unitary award theory on her, by striking her initial Action to Nullify and Complaint, and thereby putting liability to the jury. The liability finding against Dr. Leahy,

was "final and binding," 3-2A-05(i), because he did not reject it or bring an action to nullify as required by the Act, both of which requiring a minimal effort on his part to preserve his right to judicial review of the liability determination. Thus it was error to permit the jury to consider liability in the abscence of any notice of rejection and action to nullify by any party, as no case law had ever done away with the statutory requirements of a Notice of Rejection to the Health Claims Arbitration Office or an Action to Nullify in Court. To the contrary: Mrs. Crawford arqued that the Maryland Appeals Court had held that the Act mandates that the filings are necessary to secure judicial review See Tranen v. Aziz, 304 Md. 605, 612-614, 500 A.2d 636, 639-40 (1985)) and that it was outrageous for

Dr. Leahy to attempt to shift his responsibility to file the required papers, to Mrs. Crawford. Clearly, there was no confusion on Dr. Leahy's behalf as to Mrs. Crawford's intent to seek ~~judicial~~ review of the damages determinations only and there was no dispute before the trial court, over the liability finding, as evidenced by Dr. Leahy's "Motion to Strike", which sought to have Mrs. Crawford's complaint dismissed, or alternatively that Mrs. Crawford be compelled to seek judicial review of the liability determination in her favor. Mrs. Crawford also noted in her appeal that the Maryland Rules expressly authorize bifurcation of liability and damages in appropiate cases. See Md. Rule 2-503(b); *Niemeyer and Richards, Maryland Rules Commentary* at 262 (1984). Mrs. Crawford also

presented argument in her appeal that the trial courts unitary award theory virtually guarantees lengthy trials, because the parties are compelled to litigate issues that would not otherwise be before the court. In this case for example, the length of the trial was likely double or more, the time required, if only the damages issue had been tried. Thus clearly, the statutory purpose to hasten determination of medical malpractice claims, resulting in reduced costs and an improved system of justice, is advanced by limiting review to bona fide disputes. Mrs. Crawford also explained in her appeal, that the trial court error which erroneously shifted the burden of proof to Dr. Leahy, as to liabilty, could not have protected her from Dr. Leahy's subsequent appeal, had the verdict been against him. Oral

argument was presented before the Maryland Court of Appeals on January 2, 1992. The Maryland Court of Appeals subsequently filed an opinion on April 9, 1992, written by the Honorable J. Karwacki, affirming the judgement of the Circuit Court for Prince George's County (see A-4 through A-47). On April 30, 1992, Mrs. Crawford, pro se, joined by her husband, Alan D. Crawford, pro se, (collectively Mrs. Crawford) filed a "Motion for Reconsideration" with the Maryland Court of Appeals. With the benifit of the Court of Appeal's opinion in the instant case, Mrs. Crawford in sum, asked the Court of Appeals to reconsider whether the trial court had authority to accept the case at all, reasoning that if Mrs. Crawford's rejection of the Arbitration Panel finding of damages only, was indeed

defective, then it logically and lawfully follows that the trial court was obligated to dismiss the merits of the case as Dr. Leahy himself had requested. This would have then permitted Mrs. Crawford the opportunity to file an appeal to have the important question answered, without causing her to reject the liability finding in her favor. Mrs. Crawford contended that the opinion of April 9, 1992, supported her argument that the trial court erred in allowing the case to proceed de novo, since there had not been a rejection of the entire arbitration award by any party in this case, and therefore because there was not fulfillment of the condition precedent, the malpractice claim could not be permitted to be heard in court. The exact content of the Appeal Court opinion which Mrs. Crawford re-cited in her "Motion for

Reconsideration" (see A-14) is as follows:

{ Upon fulfillment of the condition precedent, malpractice claims may be heard in Court. "The final step in the arbitration process, an essential prerequisite to institution of judicial proceedings, is the filing of a notice of rejection with the director of the Arbitration Office. *Tranen*, 304 Md. at 612, 500 A.2d at 639; 3-2A-06(a). Failure to file notice of rejection permits the arbitration award to become final and binding. *Tranen*, 304 Md. at 613, 500 A.2d at 640; 3-2A-05(h). "The 'exclusive step by which the aggrieved party may initiate proceedings in court,' *Tranen*, 304 Md. at 612, 500 A.2d at 639, is the action to nullify the award.

Section 3-2A-06(b). Although called an action to nullify, the proceeding is not analogous to an appeal from an administrative decision. Rather, the action is essentially a separate common law tort action with the added element that the arbitration process must be complete. See *Attorney General v. Johnson*, 282 Md. 274, 385 A.2d 57, appeal dismissed, 439 U.S. 805, 99 S. Ct. 60, 58 L.Ed.2d 97 (1978)." }

Mrs. Crawford therefore tried to convince the Court of Appeals, that their decision to affirm judgement of the trial court, was not consistent with the written opinion in the case.

Mrs. Crawford also asked the Court of Appeals to consider whether Dr. Leahy was preventing justice from being served fairly, by withholding information from Appellants. Mrs. Crawford provided the

Court of Appeals with Dr. Leahy's answers to interrogatories that were propounded by Mrs. Crawford and to be answered under oath. Mrs. Crawford made the Court of Appeals aware that Dr. Leahy denied having ever been named in a medical negligence case, and submitted a copy of his answers in the appendix. Mrs. Crawford also provided the Court of Appeals with true test copies showing that both Dr. Leahy and Neurological Medicine, P.A., had indeed been named in a medical negligence case, filed with the Health Claims Arbitation Office in 1984. The true test copies that Mrs. Crawford had obtained on April 24, 1992, included a writ of summons and medical negligence claim that were delivered to Dr. Leahy by a Prince George's County deputy sheriff on July 11, 1984. Mrs. Crawford also included a certified copy of a partial

transcript of the trial court proceedings in the instant case, during closing argument by Dr. Leahy's attorney, to show that in a very unfair tactic, Dr. Leahy's attorney informed the jury that this was the first time Dr. Leahy had to go through something like this. Mrs. Crawford argued in her "Motion for Reconsideration" that since Dr. Leahy was concealing all information about any past medical negligence claims, it was unfair to make such a remark in front of a jury, while having deprived Mrs. Crawford of true answers through interogatories pursuant to Maryland Rule 2-421. Mrs. Crawford also attempted to convince the Court of Appeals, that because Dr. Leahy had not been truthful, his credibility as an expert witness, who testified on his own behalf in trial court, was in doubt, and that a new trial was therefore

warranted. Additionally, Mrs. Crawford asked the Court of Appeals for leave to renew discovery of the health care providers.

Although Mrs. Crawford did not agree with the opinion and decision of the Court of Appeals, she concluded that because there was no authority for the trial court to permit judicial review of a partial rejection of a Health Claims Arbitration Award, the trial court decision should be reversed and the Health Claims Arbitration Award held as binding. Alternatively, Mrs. Crawford requested that the case be remanded to the Circuit Court for Prince George's County for a new trial, with leave granted to Appellants to renew discovery of the health care providers. The Motion for Reconsideration was denied by the Court of Appeals of Maryland on May 8,

1992 (A-2 and A-3). Mrs. Crawford and her husband, Alan Crawford, then timely filed this Petition for Writ of Certiorari with the United States Supreme Court with the intent to obtain counsel, admitted to the Bar of this Court, in the event that this petition for a writ of certiorari is granted.

Pursuant to Supreme Court Rule 29.4(c), 28 U.S.C. 2403(b) may be applicable and the Court of Appeals of Maryland has not certified to the attorney general that the constitutionality of any Maryland statute was drawn into question by this case.

REASONS FOR GRANTING A WRIT OF CERTIORARI

The judgement of the Maryland Courts in this case, unfairly threatens the goal of Federal uniformity in providing quality health care for all Americans. The Maryland courts have adversely compounded the costs and time required to litigate medical malpractice claims, by compelling parties to seek judicial review of Arbitration determinations which are not in dispute and for which judicial review has not been sought. These additional costs of litigation and increased time required of the courts, will result in a worsening of the crisis this nation is now experiencing due to the ever increasing costs of health care as well as cause a further burden on this nations judicial system, already overwhelmed by civil lawsuits, of which

many are medical malpractice claims.

The Maryland Courts have decided issues in this case, that are not unique to Maryland but of importance to every individual State and to the United States Congress as well. The President of the United States has also expressed concern, that access to quality health care for significant portions of the population has been threatened, as expressed in a Message to the Congress of the United States (102d Congress, 1st Session; House Document 102-84):

> "I am pleased to submit for your consideration and enactment the `"Health Care Liability Reform and Quality of Care Improvement Act of 1991."'
>
> This legislative proposal would assist in stemming the rising costs of health care caused by medical

professional liability. During recent years, the costs of defensive medical practice and of litigation related to health care disputes have skyrocketed. As a result, the access to quality care for significant portions of the population have been threatened.

The bill would encourage States to adopt within 3 years quality assurance measures, tort reforms, and alternative dispute resolution mechanisms. A pool of funds would be available to states and hospitals in those States that implement these reforms. The quality assurance measures require effective actions to improve quality and reduce the incidence of negligence. The tort reforms would include: (1) a reasonable cap on noneconomic damages

(2) the elimination of joint and several liability for those damages; (3) prohibiting double recoveries by plantiffs; and (4) permitting health care providers to pay damages for future costs periodically rather than in a lump sum. Most of these provisions would be made specifically applicable to actions arising under the Federal Tort Claims Act.

I urge the promt and favorable consideration of this proposal, which would complement initiatives the Administration will undertake concerned with malpractice and quality of care.

George Bush.

The White House, May 15, 1991."

Two of the findings in the proposed legislation by the president are also

significant to the reasons for granting a writ of certiorari in this case:

"(a) The Federal Government is a direct provider of health care to many Americans; a source of payment for the health care of a much larger number of Americans through Medicare, Medicaid and other programs; and a promoter of quality assurance efforts. As a result, the Federal Government has a major interest in health care issues, including the availability, cost, and quality of health care.

(b) The rising costs of malpractice insurance, litigation, and liability are contributing significantly to increases in the costs of health care. These and other health care liability problems have adversely affected health care

consumers and created tensions among the medical and legal professions, the insurance industry and consumers."

Of equal significance, is the Federal Govenments goal of uniformity as expressed in the purpose of the proposed legislation by the President:

"(a) Provide incentives to States to enact health care liability tort reforms and establish alternative dispute resolution mechanisms to achieve efficient, cost effective and expeditious disposistion of health care disputes;

(b) Provide incentives to States to adopt quality assurance reforms to reduce the incidence of malpractice; and

(c) Incorporate these reforms on the Federal level through admendments to the Federal Tort Claims Act."

The President's concerns and proposals do not stand alone. Debate is continuing in the United States Congress over solutions to the national health care crisis, as it has in the individual states for many years. Indeed the United States Congress has already responded to the medical malpractice crisis by enacting the "Health Care Quality Improvement Act of 1986" (the Federal Act), title IV of Public Law 99-660. The Findings of the Federal Act are specified in Section 402 as:

"The Congress finds the following:

(1) The increasing occurence of medical malpractice and the need

to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be taken by any individual State.

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liabilty under Federal antitrust law, unreasonably discourages physicians from participating in

effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review."

"Part B - REPORTING OF INFORMATION", in pertinent part, provides for the collection of information regarding payments on behalf of health care providers for the settlement of, or satisfaction of a judgement in, a medical malpractice action or claim. Section 425 provides that it is the duty of hospitals to access this information. Section 427 paragraph b(3) specifies that hospitals are to use this information solely with respect to activities in the furtherance of the quality of health

care. This information is also available to State licensing boards, and other health care entities, including health maintenance organizations (Sec. 427 (a)).

Nothing in the Federal Act may be construed as to affect in any manner, the rights and remedies afforded patients in seeking redress for injuries caused by a health care provider's negligence, or limit defenses and immunities of health care providers. However, the Federal Act is undermined when the Maryland courts compel parties to seek judicial review of an Arbitration Panel determination of liability against a health care provider, for which relief has not been sought by any party, as has occurred in the instant case. Mrs. Crawford was denied rights to due process and equal protection under the law by the lower

courts, as provided in Section 1 of the Fourteenth Amendment to the Constitution of the United States. These same violations also denied Mrs. Crawford and the people of every State, the protection and preservation of affordable quality health care that is provided by the Federal Health Care Quality Improvement Act of 1986 (the Federal Act), and threatens the ability of the Federal government to accomplish its goal of providing a uniform approach by the States to solve the crisis now confronting this country.

Mrs. Crawford was successful in the Arbitration of her claim against Dr. Leahy and Neurological Medicine, P.A. (Dr. Leahy). Because the amount of damages she was awarded would barely cover her litigation expenses and because she was dissatisfied that a key expert

witness crucial to proving her claim of damages, was not allowed to testify over Dr.Leahy's objections, Mrs. Crawford rejected the amount of damages awarded by the Arbitration Panel but exclusively did not reject the liabilty determination against Dr. Leahy. Dr. Leahy did not file a rejection at all, and therefore did not comply with the mandated condition precedent to judicial review.

> "The final step in the arbitration process, an essential prerequisite to institution of judicial proceedings, is a filing of a notice of rejection with the director of the arbitration office." See *Tranen*, 304 Md. at 612, 500 A.2d at 639; 3-2A-06(a).

Mrs. Crawford then initiated judicial review by filing the required Action to Nullify Award and Complaint

in the Circuit Court for Prince George's County, Maryland, both expressly limited to the rejection of damages only. Dr. Leahy filed a Motion to Strike Mrs. Crawfords complaint because Mrs. Crawford did not reject the Award in toto or in the alternative that the trial court deem Mrs. Crawford rejection of the damages as a complete rejection including the liability finding against Dr. Leahy, Mrs. Crawford argued that there was nothing in the Act that should cause her to reject the liability determination in her favor and provided the trial court with both Federal and State case law in support of her claim, providing a summary of *Practice and Procedures under the Health Care Malpractice Claims Act* citing Maryland Court cases as well as a review of the law of Maryland by the United States Court of Appeals for the Fourth

Circuit in *Lipscomb v. Memorial Hospital, et al,* 733 F. Supp. 2nd 332 (4th Cir. 1984). The trial court responded by finding no authority to allow a rejection of only the damages portion of an Arbitration Award.

However, the trial court did not strike Mrs. Crawford's complaint as Dr. Leahy had sought and the trial court did not find Mrs. Crawford's rejection of damages only, to be a complete rejection of the award as Dr. Leahy had alternatively sought. Instead, the trial court granted Mrs. Crawford leave to amend her complaint. Thus the trial court did not dismiss the merits of the case. This left Mrs. Crawford in an unfair position because if in fact Mrs. Crawford's rejection was indeed defective, there was no authority whatsoever for the trial court to permit

judicial review at all. The Act mandates and the case law is clear, that a rejection of an arbitration award concludes the administrative proceeding of arbitration and is a condition precedent to judicial review. On the one hand, the trial court found no authority to permit Mrs. Crawford's rejection of damages only, but on the other hand, the trial court permits de novo review of the arbitration if Mrs. Crawford ammends her complaint. Amending her complaint and Action to Nullify however, could not undo the fact that the award had not been rejected by any party, since Mrs. Crawford did not reject the award in toto, and expressly stated so in the notice of rejection filed with the Health Claims Arbitration Office (see A-63 and A-64). Because the trial court failed to dimiss the merits of case, Mrs.

Crawford was compelled to submit the question of liability to a jury before an appeal would be ripe. Mrs. Crawford did not however change her position on the issue by amending her complaint pursuant to the court order, as evidenced by her Motion for Reconsideration submitted to the trial court 10 days before trial.

Mrs. Crawford never had an opportunity for a fair trial as to liability, because the trial court erroneously placed Mrs. Crawford in the posistion of defending the liability determination as the plantiff and explained that Dr. Leahy would have the burden of proving that he was not liable (see jury instructions as to burden of proof at A-50, A-51).

Having been relieved of the burden to again prove liabilty, and faced with no protection from an appeal by Dr. Leahy

due to the error as to the burden of proof requirement, Mrs. Crawford can not be expected to have had a fair opportunity to present her case.

Without explanation, the Court of Appeals of Maryland cited in their decision, the correct instructions as to the burden of proof, but failed to remand the case back to the lower court for a new trial (see n.5 at A-23 to A-25).

The Court of Appeals observed that the Act has no provision for cross-appeal, in support of their decision in this case. However, the Court of Appeals does not afford a claimant the same protection under the law. The effect of the "Gettes" decision, leaves the claimant standing at the court house door to ensure that if the health care provider rejects only the adverse costs

determination, the claimant may also reject the liabilty and damages determinations. Of significance, is that the Maryland legislature promptly codified and partially overrode the "*Gettes*" decision but did not make any change to the Act that would provide a means of cross-appeal for any party that failed to reject the award or file an Action to Nullify the Award. It is clear then that the legislature does not intend to provide a result that encourages retalitory rejections or a system that propells the health care crisis recklessly, by increasing litigation costs in defiance of the very purpose of the Act. Indeed, the interests of every individual in the nation are at stake, when the Maryland Courts fail to serve the legislative intent to reduce costs, which are contributing significantly to

the national health care crisis that the Federal government is desperately attempting to control. One study found that actions to nullify are filed in Maryland in over half of the cases decided by arbitration. See *J. MacAlister & A. Scanlan, Jr., Health Claims Arbitration in Maryland: The Experiment Has Failed*, 14 U. Balt. L. Rev. 481, 502 (1985).

The Maryland legislature never intended that the resourses expended to arbitrate a claim, would be tossed aside in toto for each and every rejected award, otherwise the Act would certainly increase litigation costs.

The singular use of "award" within the Act, is merely a result of the Act's reference to the conclusion of a singular proceeding, not a singular determination or award. Significantly, the legislature

did not title 3-2A-05(e) "Award" or "The Award" but carefully titled the paragraph "Determinations". Likewise, 3-2A-06(b)(3) refers to each rejection of a panel determination, not an entire award. See 3-2A-06(b)(3) at page 14 herein.

The ACT clearly provides for dispute oriented review of arbitration awards and does not provide a mandate that unrejected determinations must also be reviewed by the courts in an all or nothing approach.

Mrs. Crawford met her burden of proving liability against Dr. Leahy pursuant to the Act. Neither Dr. Leahy nor Mrs. Crawford rejected the liability determination, nor was there an action in court to nullify the award as to liabilty, by any party. The principles of justiciabilty and adversariness for an action in court, inherent in Mrs. Crawford's rights under the United States

Constitution, Fourteenth Amendment, Section 1, were not upheld for Mrs. Crawford, when the lower Courts compelled her to seek judicial review of an arbitration liability determination that was not before the Courts. See *State of Md. Central Collection v. Gettes*, 321 Md. 671, 680 n.3, 584 A.2d. 689, 693 n.3 (1991). In *Gettes* however, the Court of Appeals of Maryland, applied those principles in favor of the State. I.d. 321 Md. at 678.

Mrs. Crawford does not know why the Maryland Courts have denied her due process and equal protection under the law while she has pursued her claim against Dr. Leahy in the Maryland Courts. It may be because the Maryland Courts desire to protect Dr. Leahy and other health care providers as a special interest group. It may be because Mrs.

Crawford retained an attorney from a Washington D.C. lawfirm instead of a Maryland lawfirm, to represent her in the Maryland Courts. It may be because Mrs. Crawfords key expert witness was from the State of Virginia, and not Maryland, like Dr. Leahy.

Mrs. Crawford does know however, that the denial of her rights by the Maryland Courts in this instant case, will have a far reaching effect on the people of every State, not just Maryland. The Supreme Court of the United States should issue a writ of certorari to the Court of Appeals of Maryland because of the adverse impact that the State decision may have on the Federal Government's ability to control health care costs and the national health care crisis.

APPENDIX

Court of Appeals

of Maryland

Courts of Appeal Building

Annapolis, Md. 21401-1699

May 8, 1992

Helon D. Crawford

Alan D. Crawford

6208 Gallery Street

Bowie, MD 20720

RE: Helon Denise Crawford et al. v.

William Leahy et al.

No. 84, September Term, 1991

Dear Mr. & Mrs. Crawford:

Please be advised that the motion for reconsideration filed in the above entitled case was denied by the Court on May 8, 1992.

Very truly yours,

/s/ Alexander L. Cummings

Alexander L. Cummings

Clerk

ALC:bmd

cc: Mark S. Carlin, Esq.

Neal M. Brown, Esq.

IN THE COURT OF APPEALS OF MARYLAND

NO. 84

September Term, 1991

Helon Denise Crawford et al.

V.

William R. Leahy et al.

Murphy, C.J.

Eldridge

Rodowsky

McAuliffe

Chasanow

Karwacki

Bell

JJ.

Opinion by Karwacki, J.

Filed: April 9, 1992

In this case we are once more called upon to construe the Health Care Malpractice Claims Act, Maryland Code (1989, 1991 Cum. Supp.) 3-2A-01 through 3-2A-09 of the Courts and Judicial Proceedings Article (the Act). The narrow question presented is whether an award of the health claims arbitration panel in favor of the claimant on the merits can be subdivided into an award finding liability and an award assessing damages, permitting the claimant to seek judicial review of only the amount of damages awarded. We shall answer that question in the negative and affirm the judgement of the trial court.

I.

Helon Denise Crawford alleged that she was injured as a result of malpractice by Dr. William R. Leahy and his professional association,

Neurological Medicine, P.A. (collectively "Dr. Leahy"). Mrs. Crawford and her husband[1] (Crawfords), filed a claim against Dr. Leahy, pursuant to the Act. After a hearing before a health claims arbitration panel, the Crawfords obtained an award of $37,768 against Dr. Leahy. The panel's decision was rendered on a pre-printed form which compelled the arbitrators to set forth separately their decisions regarding liability, damages, and costs, as required by the Act.[2]

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1 Alan Crawford, the husband of Mrs. Crawford, joined her in a claim for loss of consortium.

2 Section 3-2A-05 provides in pertinent part:

"(e) *Determinations.*—The arbitration panel shall first determine the issue of liability

Dissatisfied with the amount of damages, the Crawfords filed a pleading in the Circuit Court for Prince George's County entitled "Notice of Action to Nullify Award as to Damages Only," attempting to reject the award of the panel as it related to damages only in an effort to prevent de novo judicial review of the arbitration panel's liability determination. The Crawfords

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with respect to a claim referred to it. If the arbitration panel determines that the health care provider is not liable to the claimants the award shall be in favor of the health care provider. If the arbitration panel determines that a health care provider is liable to the claimant or claimants,

simultaneously filed a complaint, as required by by Maryland Rule BY4, alleging that Dr. Leahy had been negligent in his care and treatment of Mrs. Crawford. The Crawfords demanded a jury trial "on all issues herein."

In response, Dr. Leahy filed a "Motion to Strike or, in the Alternative, for Complete Rejection of the Arbitration Award." In that pleading, Dr. Leahy

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> it shall then consider, itemize, assess, and apportion appropiate damages against one or more of the health care providers that it has found to be liable. The award shall itemize by category and amount any damages assessed for incurred medical expenses, rehabilitation costs, and loss of earnings. Damages assessed for any future

asserted that the Act required that the Crawfords reject the liability finding in their favor as well as the damages determination or, alternatively, that the Crawfords' notice of rejection should be deemed to have rejected the entire award. Concluding that there was "no authority to allow an appeal from Health Claims Arbitration on the issue of damages alone," Judge William H. McCullough granted Dr. Leahy's motion to strike, giving the Crawfords leave to file an

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expenses, costs, and losses shall be itemized seperately."

"(f) *Assessment of costs.*—The award shall include an assessment of costs, including the arbitrators' fees.—If there is no panel determination, the panel chairman shall assess costs."

amended notice of action to nullify award and complaint.

Thereafter, the Crawfords filed an "Amended Notice of Action to "Nullify Award," stating that they "reject the award of the Health Claims Arbitration panel as it relates to liability and damages." The Crawfords also filed an "Amended Complaint" that was identical to the originally filed complaint; both pleadings contained allegations of negligence. Dr. Leahy answered, denying liability.

Ten months later, after extensive discovery regarding matters relevant to both liability and damages, and ten days before trial, the Crawfords, in another attempt to limit the trial solely to the issue of damages, moved for reconsideration of the court's earlier decision. The Crawfords suggested that

"[t]he `all or nothing' approach adopted by judge McCullough requires plantiffs to prove a non sequitur, that is, that the liability finding in their favor is `not correct.'" Dr. Leahy opposed this motion, noting that once the award is rejected by either party, the case proceeds de novo, so that the jury necessarily considers the issue of Dr. Leahy's liability. Dr. Leahy reiterated his prior arguments that neither the statute nor the rules permit piecemeal rejection of an award as asserted by the Crawfords. Judge James P. Salmon, who was to preside at the trial, denied the motion for reconsideration.

The case proceeded to trial before a jury. In support of their claims, the Crawfords presented evidence which included not only the arbitration award, but also extensive expert testimony on

the issue of Dr. Leahy's alleged negligence. The case was submitted to the jury on specific issues pursuant to Md. Rule 2-522. The jury returned a special verdict finding that Dr. Leahy was not negligent with regard to his care and treatment of Mrs. Crawford.

The Crawfords timely appealed to the Court of Special Appeals from the judgment entered on that special verdict. We issued a writ of certiorari on our own motion, prior to argument before the Court of Spcial Appeals, to consider the important issue raised by this appeal.

II.

When the General Assembly originally adopted the Act by Ch. 235 of the Acts of 1976, it mandated that all claims for medical malpractice be submitted to an artitration panel prior to pursuing them

by an action in court.[3] Nevertheless, we have explained:

> "The mandatory arbitration requirement does not divest courts of subject matter jurisdiction over health claims, but rather `"creates

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[3] Originally, 3-2A-02(a) mandated arbitration for all medical malpractice claims in which damages of more than $5,000 were sought. Section 3-2A-02(a) (1974, 1979 Cum. Supp.). The section has since been amended to require arbitration for all such claims in which damages of more than the limit of the concurrent jurisdiction of the District Court are sought. Ch. 640 of the Acts of 1986 (codified as amended at 3-2A-02(a) (1989, 1991 Cum. Supp.)).

a condition precedent to the institution of a court action."' *Tranen*, 304 Md. at 612, 500 A.2d at 639 (quoting *Oxtoby v. McGowan*, 294 Md. 83, 91, 447 A.2d 860, 865 (1982)). Upon fulfillment of the condition precedent, malpractice claims may be heard in court.

"The final step in the arbitration process, an essential prerequisite to institution of judicial proceedings, is the filing of a notice of rejection with the director of the Arbitration Office. *Tranen*, 304 Md. at 612, 500 A.2d at 639; 3-2A-06(a). Failure to file notice of rejection permits the arbitration award to become final and binding. *Tranen*, 304 Md. at 613, 500 A.2d at 640; 3-2A-05(h).

"The 'exclusive step by which the aggrieved party may initiate proceedings in court,' *Tranen*, 304 Md. at 612, 500 A.2d at 639, is the action to nullify the award. Section 3-2A-06(b). Although called an action to nullify, the proceeding is not analogous to an appeal from an administrative decision. Rather, the action is essentially a separate common law tort action with the added element that the arbitration process must be complete. See *Attorney General v. Johnson*, 282 Md. 274, 385 A.2d 57, appeal dismissed, 439 U.S. 805, 99 S. Ct. 60, 58 L.Ed.2d 97 (1978)."

Ott v. Kaiser-Georgetown Health Plan, 309 Md. 641, 645-46, 526 A.2d 46, 49 (1987).

A.

Whether the Act permits rejection of the panel's award solely as to damages is an issue of statutory construction and as such is ordinarily determined by reference to legislative intent. When we seek to ascertain and effectuate legislative intent, "we look first to the words of the statute, read in light of the full contect in which they appear, and in light of external manifestations of intent or general purpose available through other evidence." *Cunningham v. State*, 318 Md. 182, 185, 567 A.2d 126, 127 (1989). See *State v. Bricker*, 321 Md. 86, 92, 581 A.2d 9, 12 (1990); *Davis v. State*, 319 Md. 56, 60, 570 A.2d 855, 857 (1990); *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513, 525 A.2d 628, 632 (1987). In doing so, we give the language of the statute its natural

and ordinary signification, bearing in mind the statutory aim and objective. *Harford County v. University*, 318 Md 525, 529, 569 A.2d 649, 651 (1990); *NCR Corp. v. Comptroller*, 313 Md. 118, 124-25, 544 A.2d 764 767 (1988); *Boulden v. Mayor*, 311 Md. 411, 414, 535 A.2d 477, 479 (1988); *In Re Ramont K.*, 305 Md. 482, 484, 505 A.2d 507 508 (1986). Moreover, we approach the analysis of the language from a "commonsensical," rather than a technical perspective, *United States v. Universal Corp.*, 344 U.S. 218, 221, 73 S. Ct. 227, 229, 97 L.Ed. 260, 264 (1952); *Dickerson v. State*, 324 Md. 163, 171, 596 A.2d 648, 652 (1991), always seeking to avoid giving the statute a strained interpretation of one that reaches an absurd result. *Potter v. Bethesda Fire Dep't*, 309 Md. 347, 353, 524 A.2d 61, 64 (1987); *Schweitzer v. Brewer*, 280 Md.

430, 438-39, 374 A.2d 347, 353 (1977).

Applying these principles to the language of the Act, the arbitration award on the merits clearly is comprised of two essential and related determinations: liability and damages. 3-2A-05(e),(h). These combined determinations on the merits constitute the "award" of an arbitration panel as defined by the Act. *Id.* Under 3-2A-05(e) of the Act, the health claims arbitration panel issues an "award" consisting of "determinations" regarding liability and, if applicable, damages:

> "*Determinations.*--The arbitration panel shall first determine the issue of liability with respect to a claim referred to it. If the arbitration panel determines that the health care provider is not liable to the

claimant or claimants *the award* shall be in favor of the health care provider. If the arbitration panel determines that a health care provider is liable to the claimant or claimants, it shall then consider, itemize, assess, and apportion appropriate damages against one or more of the health care providers that it has found to be liable. *The award shall itemize . . . any damages . . .*"

3-2A-05(e) (emphasis added). Thus, the language of the Act carefully differentiates not only between the singular and the plural, but also between the liability and damage determinations and the award. The Act consistently and repeatedly refers to the panel's determinations on the merits as "an award." The ordinary and reasonable

meaning of the explicit use of the term "award" in this statute is that the panel's award on the merits is a single award, which includes both a determination of liability and a determination of damages. The Crawfords' construction would make the terms "determinations" and "award" synonymous and interchangeable. Nothing in the statute supports such a construction. See Board of Educ., Garrett Co. v. Lendo, 295 Md. 55, 63, 453 A.2d 1185, 1189 (1982) (a court may not insert, omit, or ignore words to make a statute express intentions not evident in its original form). Finally, 3-2A-06(a) of the Act states that "{a} party may reject an award . . . for any reason."[4]

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[4] In order to initiate proceedings in court, either party

The Crawford's construction also would require us to construe the word "an" preceding "award as surplusage. Notwithstanding the plain and unambiguous language of the statute, the Crawfords contend that the "arbitration panel's determination is comprised of multiple awards," and that a party may limit its rejection to the panel's determination of damages alone. The Crawfords offer no statutory analysis in support of their

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must file a notice of rejection of the award in substantial compliance with the Maryland BY Rules that implement the Act. See 3-2A-06(a); Md. Rule BY2. In an action to nullify the award, "[t]he award shall be presumed to be correct, and the burden is on the party rejecting it to prove that it is not correct."

3-2A-06(d).

position. Their contention that the Act permits piecemeal rejection of one or more portions of the arbitration award would require judicial amendment of the Act to read: "Any party may reject either the panel's liability determination or the panel's damages determination, or both, for any reason." No language in the statute supports such an amendment. According to 3-2A-06(a) of the Act, it is only the arbitration panel's "award" that may be rejected and, as such, there is no basis in law for a rejection of only the damages determination portion of the award on the merits. Simply stated, once an award is rejected by either party, regardless of the specific determination that is disputed, "the matter is tried all over." Maryland Civil Pattern Jury Instructions 27:2, at 595 (2d ed. 1984), quoted in

Newell v. Richards, 323 Md. 717, 734, 594 A.2d 1152, 1160-61 (1991).[5] In sum, the

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[5] In *Newell* we pointed out that the pattern jury instruction quoted is only accurate if coupled with an instruction as to the common law burdens of proof in a medical malpractice case. We advised:

> "If the claimant is unsuccessful before the arbitration panel, the jury is instructed that the plantiff has the burden of proof and that the award in favor of the health care provider is presumed correct. If the claimant is successful before the arbitration panel, the court should not instruct the jury that the burden of proof

plain language of the Act supports the trial court's conclusion that the panel's award is indivisible for purposes of judicial review. Consequently, when the

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> is on the defendant/health care provider; the court should instruct the jury that the claimant has the burden of proof and couple that with an instruction that there has been a health claims panel award in favor of the claimant which is presumed correct and that the burden is on the health care provider to show that the award is not correct. Thus the health care provider's burden of proof relates only to an item of evidence, i.e., that the panel award is not, in

award is rejected, the action to nullify that award must present the issue of liability as well as the issue of damages for determination in the malpractice action in court.

B.

In addition to the lack of support in the language of the Act for is construction as urged by the Crawfords, there is no case law permitting rejection of only the damage determination of an arbitration award. Nevertheless, the Crawfords take solace in our recent

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> fact, correct. An arbitration award in favor of a claimant is admissable and presumed correct, but it does not shift the common law burden of proof to the health care provider."

Id. at 733-34, 594 A.2d at 1160.

decision in *Central Collection v. Gettes*, 321 Md. 671, 584 A.2d 689 (1991). *Gettes*, however, provides no support for segregating an award on the merits into an award finding liability and an award assessing damages. In fact, in *Gettes* we explicitly avoided either deciding or intimating a decision on the specific issues raised by the Crawfords here:

> "By treating an adverse allocation of costs as a separate award against a party who prevails on the merits, we do not intimate any view on whether awards on the merits may be segregated into awards finding liability and awards assessing damages. We are mindful of Chief Judge Gilbert's dictum for the Court of Special Appeals in *Osheroff v. Chestnut Lodge, Inc.*:

'Once the arbitration process has concluded, any party to the proceeding may, for any reason, reject the panel's determination of liability, damages, or both, and invoke court review.' Ultimate resolution of that question must await another day when the issue is squarely presented. For example, a claimant may reject the award and file an action to nullify, complaining only of inadequate damages, while the health care provider does not reject and bring any action to nullify the adverse award that determines liability as well as damages. Query: In the action to nullify in the circuit court, may the health care provider insist, over objection, on introducing evidence exculpatory as

to liability? May the health care provider have the issue of liability submitted to the jury?"

Id. at 680 n.3, 584 A.2d at 693 n.3 (citation omitted).[6]

Gettes was a collection action brought by the State against a health care provider to recover the costs of

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[6] In an emergency response to *Gettes*, the General Assembly amended the Act to partially codify and partially override the decision. Ch. 25 of the Acts of 1991. Significantly, the Legislature did not address the question of rejection of damages only, despite the express reservation of that issue in *Gettes*.

arbitrating a health care claim.[7] Although Dr. Gettes, prevailed on the merits both in arbitration and at trail, the arbitration panel assessed one-half of the arbitration costs against him. Dr. Gettes "did not seek any form of

---

[7] Costs incurred in an arbitration proceeding, including arbitrators' fees, are routinely advanced by the Health Claims Arbitration Office. When an arbitration proceeding concludes, whether by panel decision or by dismissal, costs are assessed against one or both of the parties. Such assessments of costs are payable to the State as reimbursement for its advances. See *Gettes*, 321 Md. at 676, 584 A.2d at 691.

direct judicial review of the panel's adverse award of partial costs." *Id.* at 673, 584 A.2d at 690. Eight years later, after repeated demands for payment of the arbitration costs, the State filed suit against Dr. Gettes in the District Court. On appeal, we held that "for purposes of judicial review of a panel's allocation of costs, ad adverse allocation of costs should be treated under the Act as an award, separate from the determination of the merits of the malpractice claim." *Id.* at 679-80, 584 A.2d at 693 (footnote omitted). We reasoned that "(c)onceptualizing the panel's determination as comprising multiple awards is consistent with principles of justiciability, and particularly with the adversariness requirement for an action in court," *id.* at 678, 584 A.2d at 692, because those principles require that the

party aggrieved by an adverse panel decision take affirmative steps to overturn it.

The Crawfords concede that the holding in *Gettes* is inapposite to the instant case, but contend that "reversal of the judgment in favor of Dr. Leahy is compelled by the same 'principles of justiciability,' . . . that led the [*Gettes*] Court to hold that a health claims arbitration panel's determination is comprised of multiple awards, at least as to its costs and merits decisions." The Crawford's reliance on the rationale of *Gettes* is misplaced. First, the Crawfords' stated concerns for "justiciability" and "adversariness" ignore that, unlike Dr. Gettes, Dr. Leahy immediately and successfully challenged the Crawfords' novel attempt at rejection of the damages award only to ensure that

the issue of Dr. Leahy's liability would be submitted to the jury. In contrast, Dr. Gettes made no attempt by an action to nullify or otherwise to challenge the panel's allocation of costs against him.

Additionally, the Crawfords entirely fail to consider how the "nature and scope of review" applicable to decisions on the merits "affect the conceptual number of awards." *Gettes*, 321 Md. at 679, 584 A.2d at 693. Although *Gettes* does construe the costs allocation as separate from the award on the merits, we in no way suggested by our reasoning that the award on the merits is divisible into separate awards of liability and damages. Rather, *Gettes* rests on and in fact highlights the substantive distinction between an assessment of costs and an award by the arbitration panel on the

merits. Our rationale was based squarely on the statutory and practical differences between an "award allocating costs" and an "award on the merits":

> "[I]n arbitrations under the Act, we do not deal with a system in which costs follow the result. . . . There is no automatic connection between the obligation for arbitration costs, as determined by the panel, and the result on the merits, either in arbitration or in any subsequent malpractice action in court."

Id. at 676, 584 A.2d at 691. Further, we emphasized that "the arbitration costs allocation in arbitrated claims under the Act is a discretionary function of the arbitration panel," and, as such, costs assessments are subject to judicial

review "only on very limited grounds."[8] *Id.* at 679, 584 A.2d at 693. Significantly, the costs assessment "cannot be submitted to a jury trying the malpractice case." *Id.*

These distinctions between the assessment of costs and the award on the

---

[8] In the panel's discretion, costs may be assessed against either the prevailing or the losing party, or apportioned between them. *Tabler v. Medical Mut. Liab. Ins.*, 301 Md. 189, 200, 482 A.2d 873, 879 (1984). In certain circumstances, even the administrative director of the HCAO "may rule on all issues of law arising prior to hearing that are not dispositive of the case and shall include the assessment of costs." 3-2A-05(a) (2).

merits form the basis for the decision in *Gettes*:

> "Because the award of arbitration costs by the arbitration panel is distinct from the merits of the malpractice claim in arbitration, any review and reallocation of arbitration costs cannot automatically follow the result of the malpractice action in the circuit court, even if that action is tried nonjury. For these reasons we hold that for purposes of judicial review of a panel's allocation of costs, an adverse allocation of costs should be treated under the Act as an award, separate from the determination of the merits of the malpractice claim."

Id. at 679-80, 584 A.2d at 693 (footnote

omitted). No analogous distinction reasonably can be made to segregate the panel's determination of negligence from its determination of the damages necessary to compensate for that negligence. Once of the fundamental principles of tort law is that damages are an integral element of negligence liability. See, e.g., *B.N. v. K.K.*, 312 Md. 135, 141, 538 A.2d 1175, 1178 (1988) (traditional elements of a negligence cause of action are a duty, a breach of that duty, causation, and damages). A determination of damages in a tort action is neither discretionary nor an administrative function and is entirely dependent on the corresponding determination of liability. Indeed, to evaluate damages fairly, the jury will necessarily be influenced by the very facts underlying the issue of liability.

Finally, Gettes does not engage in the statutory reconstruction advocated by the Crawfords. *Gettes*' construction of "an award" to mean either the allocation of costs or the award on the merits (liability and damages) was entirely consistent with the language of the Act. The Act's distinctions between "assessment of costs" and "determinations" on the merits strongly indicate that the General Assembly perceived an "award of costs" as a separable award that bears no relationship to the "award on the merits." Compare 3-2A-05(f) (subtitled "*Assessment of costs*") with 3-2A-05(e) (subtitled "*Determinations*"). The natural and probably conclusion underlying these provisions is that the assessment of costs is a discretionary function of the health claims arbitration

panel that does not depend on or relate to the substantive award on the merits. Accordingly, if the rationale of *Gettes* has any application to the instant case, it supports the conclusion that the Crawfords may not reject only the damages determination of an arbitration award because, in contrast to allocations of administrative costs, there is no statutory basis for concluding that the arbitration panel's determination of damages is a separable award independent of its liability determination.

The Crawfords also cite dicta in several other cases as additional support for the contention that the rejection of damages only is allowed. For example, in *Osheroff v. Chestnut Lodge*, 62 Md. app. 519, 490 A.2d 720, cert, denied, 304 Md. 163, 497 A.2d 1163 (1985), the Court of

Special Appeals stated that "[o]nce the arbitration process has concluded, any party to the proceeding may, for any reason, reject the panel's determination of liability, damages, or both, and invoke court review." *Id.* at 523, 490 A.2d at 722. As we noted in Gettes, however, Osheroff did not reach or analyze this question.[9] See *Gettes*, 321 Md. at 680 n.3, 584 A.2d at 693 n.3.

Neither does *Hahn v. Suburban Hosp. Ass'n*, 54 Md. App. 685,461 A.2d 7 (1983),

---

[9] The issue in *Osheroff* was whether the appellant substantially complied with the procedural requirements for rejection of the arbitration award. The *Osheroff* court held that the appellant's pleadings contained "all of the essential elements of a viable declaration" for purposes of challenging

provide any support whatsoever for the Crawford's position. *Hahn* involved "the sufficiency of evidence necessary to rebut the statutory presumption of correctness of an arbitration award." *Id.* at 686, 461 A.2d at 8. As Judge McCullough observed below, the only reference to separating the damages and liability determinations of the panel appears in the syllabus of the case that precedes the published opinion. Like *Osheroff, Hahn* neither decides, suggests, nor analyzes whether a party may limit

---

the arbitration award. Id. at 526, 490 A.2d at 723. In so doing, the Court of Special Appeals looked to the substance of the filed pleadings and applied the liberal policy favoring amendments "so that causes of action may be heard on the merits." Id.

its rejection to the panel's damage determination alone.

Finally, our comment in *Su v. Weaver*, 313 Md. 370, 380, 545 A.2d 692, 697 (1988), "that there may be multiple issues of liability . . . is more consistent with the purpose of the Act," merely explains our holding that the panel's award may include multiple determinations on alternative theories of liability advanced by a claimant.[10] *Su* did not mention or decide the issue presented here.

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[10] *Su* concerned issues of liability involving diagnosis, surgical treatment, and follow-up care, upon which the panel specifically delineated their findings.

C.

The trial court rested its decision to strike the Crawford's original notice and complaint upon its conclusion that neither the Act nor the case law provided for rejection of "only the damages part of the arbitration award." That ruling is entirely consistent with the express purposes of the Act.

When adopted, the Act was intended to hasten determination of medical malpractice claims, resulting in an improved system of justice. In adopting the Act, the Legislature clearly anticipated that cost and time savings would result if parties frequently accepted the panel determination, either as the final decision or as the basis for payment. *See K. Quinn, The Health Care Malpractice Claims Statute: Maryland's Response to the Medical Malpractice*

Crisis, 10 U. Balt. L. Rev. 74, 93-94 (1980). The Act's presumption that the arbitration award is correct is specifically intended to deter rejection of panel decisions. See 3-2A-06(d); *J. MacAlister & A. Scanlan, Jr., Health Claims Arbitration in Maryland: The Experiment has failed*, 14 U. Balt. L. Rev. 481, 501-02 (1985).

Permitting rejection of damages alone, however, would have the opposite effect. If a plantiff may reject only the damage portion of the award, then defendants will likely reject every panel determination of their liability. If rejection becomes matter of course, and court action routine, there is no prospect of achieving the Act's fundamental purpose of more economical justice.

Moreover, actions to nullify the award by all parties to a health claims arbitration would become routine in medical malpractice cases because the Act contains no provisions for "cross-rejection" similar to "cross-appeals" available pursuant to Maryland Rule 8-202(e). In circumstances such as this case, when the claimant obtains a favorable determination of liability, but is dissatisfied with the damage determination, the claimant must now weigh the risks of retrying liability, albeit aided by the presumption of correctness of the award, against the possibility of obtaining more damages. If the claimant is permitted to reject only damages, however, the incentive to accept the amount of the arbitration award is dramatically diminished, given that at trial,

liability would be a certainty, and not merely presumed correct. Thus "the rule urged by [the Crawfords] encourages resort to the courts by providing a claimant with an unfair advantage." *Su v. Weaver*, 313 Md. at 381, 545 A.2d at 697. With no risk of an adverse jury verdict on liability, rejection of damages by the claimant becomes a certainty and settlement resulting from the arbitration award a rarity. These consequences defeat the primary purpose of the Act: to reduce costs by creating a reliable and acceptable alternative to a medical malpractice action in court.

In addition, the impact of parsing the award into separate portions of liability and damages would be unwieldy and expensive. If the claimant is allowed to reject only the damage determination of the arbitration award,

the health care provider must either reject the award as a matter of course or weigh the risks of waiting to see whether and what the claimant rejects. Under these circumstances, the health care provider would be required to post an attorney at the courthouse door on the 30th day after the award is served on the parties to ensure that, if the claimant rejects only the damage portion of the award, the health care provider also may reject the panel's determination of liability. Surely the Act does not contemplate such an unworkable and costly result.

In conclusion, the trial court properly applied the Act and preserved all parties' rights to a judicial determination of liability and damages on the merits. This ruling not only

satisfies justiciability and adversariness requirements, but also preserves and promotes the General Assembly's goal of establishing a reliable and economical system for resolution of malpractice claims.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED, WITH COSTS.

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

HELON D. CRAWFORD

Plantiff

vs

William Leahy, M.D., et al

Defendants

CAL 89-23885

Filed In
Open Court
2-1-91

VERDICT SHEET

1. Did negligence on the part of Defendants cause injury to Mrs. Crawford?

Yes_____ No___X___

If your answer is "no" to question 1 go no further.

2. Did negligence on the part of Mrs. Crawford contribute to her own injuries?

Yes_____ No_____

If your answer is yes to question 2 go no further.

3. In what amount do you award damages in favor of Mrs. Crawford?

$_____

4. In what amount do you award damages in favor of Mr. and Mrs. Crawford, jointly?

$_____

/s/ T W Fisher
FOREMAN

MPJI 27-2

BURDEN OF PROOF

A MARYLAND STATUTE REQUIRES A MEDICAL MALPRACTICE CLAIM TO BE SUBMITTED TO ARBITRATION BEFORE THE MATTER MAY BE TRIED BY THIS COURT. EITHER PARTY MAY REJECT THE ARBITRATORS' FINDING AND BRING SUIT IN THIS COURT. IF THE ARBITRATOR'S FINDING IS REJECTED THE MATTER IS TRIED ALL OVER.

THE CLAIM IN THIS CASE WAS SUBMITTED TO ARBITRATION AND IT WAS DECIDED THAT THE DEFENDANTS WERE LIABLE AND THAT THE PLANTIFFS WERE TO BE AWARDED DAMAGES TOTALLING $37,768.00 (See Plantiff's Exhibit 31). YOU ARE NOT BOUND BY THE ARBITRATOR'S DECISION. HOWEVER, UNDER THE LAW THAT DECISION IS PRESUMED TO BE CORRECT AND THE PARTY WHO SEEKS TO OVERCOME THE DECISION HAS THE BURDEN OF

PROVING BY A PREPONDERENCE OF EVIDENCE THAT THE DECISION IS WRONG. IN MEETING THIS BURDEN, THE PARTY WHO SEEKS TO OVERCOME THE DECISION MAY RELY ON THE SAME, LESS OR MORE EVIDENCE THAN WAS PRESENTED TO THE ARBITRATOR.

IN THIS CASE THE CRAWFORDS CONTEND THAT THE ARBITRATION PANEL WAS INCORRECT, IN PART, SINCE THEY CONTEND THAT THE AMOUNT OF DAMAGES AWARDED WAS TOO LOW. PLANTIFF'S SEEK DAMAGES IN EXCESS OF THE $37,768.00 AWARDED BY THE ARBITRATION PANEL. PLANTIFFS HAVE THE BURDEN OF PROOF IN THIS REGARD, i.e., PLANTIFFS MUST PROVE EACH ELEMENT OF SUCH DAMAGES BY A PREPONDERENCE OF THE EVIDENCE.

THE DEFENDANTS IN THIS CASE CONTEND THAT THEY WERE NOT NEGLIGENT AND THAT THE HEALTH CLAIMS ARBITRATION PANEL WAS WRONG IN FINDING NEGLIGENCE ON THE PART OF

DEFENDANTS. THE DEFENDANTS HAVE THE BURDEN OF PROOF IN THIS REGARD, i.e. DEFENDANTS MUST PROVE THAT THEY WERE NOT NEGLIGENT BY A PREPONDERENCE OF EVIDENCE.

IN THE CIRCUIT COURT FOR

PRINCE GEORGE'S COUNTY, MARYLAND

HELON D. CRAWFORD, et al.	)	
	)	
Plantiff	)	Civil Action
	)	
vs	)	No.
	)	
William Leahy, M.D.,	)	CAL 89-23885
	)	
et al.	)	
	)	
Defendants	)	

ORDER

Upon consideration of plantiffs' Motion to Reconsider the Opinion and Order of March 19, 1990, it is by the Court this _____ day of January 1991,

ORDERED, that the Motion be and it is hereby granted; and it is

FURTHER ORDERED, that trial in this case shall be limited to the question of damages only.

The Honorable James Salmon

Circuit Judge

Denied

/s/ James P Salmon

1/23/91

IN THE CIRCUIT COURT FOR

PRINCE GEORGE'S COUNTY, MARYLAND

Helon Denise Crawford, et al	:	
Plantiffs	:	
vs.	:	CAL 89-23885
William Leahy, M.D., et al	:	
Defendants	:	

OPINION AND ORDER

The Court has reviewed Defendants' Motion to Strike or in the Alternative for Complete Rejection of Arbitration Award and Plantiffs' Opposition to said motion. The Court is not persuaded by the cases cited in Plantiffs' memorandum.

In Hahn v. Suburban Hospital Ass. Inc., 54 Md. App. 685 (1983), the only mention of separating liability from damages is in the summary that appears

before the opinion of the case. Nowhere in the opinion is mention made that a party may appeal an arbitration award on the issue of damages only. As Justice Alpert states at the beginning of the opinion the court is "called upon for the first time to determine the sufficiency of evidence necessary to rebut the statutory presumption of correctness of an arbitration award." Id. at 686. The case is not about appealing an award of damages only.

In Osheroff v. Chestnut Lodge, 62 Md. App. 519, (1985), the court stated that "once the arbitration process has concluded, any party to the proceeding may, for any reason, reject the panel's determination of liability, damages, or both, and invoke court review. Courts Art. Sec. 3-2A-06(a)."

This court does not feel bound by this sentence. Courts Article, Section 3-2A-06(a) does not provide for appealing only the damages part of an arbitration award. Having found no authority to allow an appeal from Health Claims Arbitration on the issue of damages alone, it is, therefore, this 19 th day of March, 1990, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that Defendants Motion to Strike is granted with leave granted to plantiffs to amend their complaint.

/s/ William H. McCullough

WILLIAM H. McCULLOUGH, JUDGE

STATE OF MARYLAND

HEALTH CLAIMS ARBITRATION OFFICE

ARBITRATION PANEL DETERMINATION

CASE NAME: Crawford V. Leahy

CASE NUMBER: HCA Number 88156

HEARING DATE: November 6, 1989

According to the Health Claims Arbitration Act, Section 3-2A-05(e) and 3-2A-05(f), the arbitration panel shall first determine the issue of liability with respect to a claim referred to it. If the arbitration panel determines the health care provider(s), not liable to the claimant or claimants, the Award shall be in favor of the health care provider(s), (finding #1).

If the arbitration panel determines health care provider(s) liable to the claimant or claimants it then shall

consider , assess, and apportion appropiate damages against one or more of the health care providers that it has found to be liable (finding #2).

In all cases, Finding #3 shall be a specific assessment of the responsibility for costs against one or more of the parties.

1. LIABILITY: Defendants are liable to the plantiffs as follows:

2. DAMAGES:

a. Past medical expenses $ 11,530.00

b. Future medical expenses -0-

c. Past loss of earnings 6,238.00

d. Future loss of earnings -0-

e. Noneconomic damages 15,000.00

f. Other Damages (explain) 5,000.00

TOTAL: $ 37,768.00

3. COSTS: 75%-25% - to include all costs including panel costs, and as set forth in Order dated 11/6/89 in the amount of $286.87.

/s/ E. Newton Steely — 11/13/89

Chairman's Signature — Decision Date

E. Newton Steely Jr., Esquire

STATE OF MARYLAND

EXECUTIVE DEPARTMENT

WILLIAM DONALD SCHAEFER
GOVERNOR

HEALTH CLAIMS ARBITRATION OFFICE

118 North Howard Street, Suite 610
Baltimore, Maryland 21201
(301) 333-4018 1-800-492-1951
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WALTER R. TABLER, DIRECTOR

January 4, 1990

Mark S. Carlin, Esquire

Sherman, Meehan, & Curtin

1900 M Street, N.W.

Suite 601

Washington, D.C. 20036

Mark D. Gately, Esquire

Miles & Stockbridge

10 Light Street

Suite 1300

Baltimore, Maryland 21202

Re: CRAWFORD v. Leahy

HCA #88-156

Dear Counsel,

Please be advised that the arbitration costs on the above-referenced case total $3,380.45. Claimants to pay $845.11 and Defendants to pay $2,535.34.

I would appreciate receiving a check, in the afore-mentioned amount, made payable to the "State of Maryland".

Thank you for your anticipated cooperation.

/s/ Daryl Washington

Very truly yours,

Daryl Washington

Docket Clerk

333-4028

DBW/eg

BEFORE THE HEALTH CLAIMS

ARBITRATION OFFICE

HELON DENISE CRAWFORD	)	
	)	
and	)	
	)	
ALAN CRAWFORD	)	
	)	
Claimants,	)	
	)	HCA No.
v.	)	88-156
	)	
William Leahy, M.D.	)	
	)	
and	)	
	)	
NEUROLOGICAL MEDICINE, P.A.,	)	
	)	
Health Care Providers.	)	

NOTICE OF REJECTION OF AWARD OF

HEALTH CLAIMS ARBITRATION PANEL

Come now the claimants, Helon Denise Crawford and Alan Crawford, by undersigned counsel, and reject the award of the arbitration panel in that inadequate damages were awarded claimants Helon Denise Crawford and Alan Crawford.

Claimants do not reject the finding of negligence and/or the violation of the standard of care found against the health care providers William Leahy, M.D. and Neurological Medicine, P.A.

The award of the panel is hereby declined and rejected pursuant to Md. Cts. & Jud. Proc. Code Ann. 3-2A-06(a).

Respectfully submitted,

SHERMAN, MEEHAN, & CURTIN, P.C.

/s/ Mark S. Carlin

Mark S. Carlin
1900 M Street, N.W.
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Washington, D.C. 20036
(202) 331-7120

Supreme Court, U.S.
FILED
SEP 4 1992
OFFICE OF THE CLERK

(2)

Number 92-241

UNITED STATES SUPREME COURT

OCTOBER, 1992 TERM

HELON DENISE CRAWFORD, ET AL.,

PETITIONERS,

v.

WILLIAM LEAHY, ET AL.,

RESPONDENTS,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

5894

QUESTION PRESENTED

Is the Court of Appeals of Maryland's interpretation of the Maryland Health Care Malpractice Claims Act [Maryland Courts and Judicial Proceedings Code Annotated, §§3-2A-01 through 3-2A-09 (1989, 1991 Cum. Supp.)] repugnant to the United States Constitution or the laws of the United States in its holding that the Petitioners, who sought judicial review of a health claims arbitration panel award in their favor, could not subdivide the award into a finding of liability and an assessment of damages and obtain review of only the damages portion of the award?

LIST OF ALL PARTIES

Helon D. Crawford

6208 Gallery Street

Bowie, Maryland 20720

Alan D. Crawford

6208 Gallery Street

Bowie, Maryland 20720,

Petitioners,

William Leahy, M.D.

Neurological Medicine, P.A.

7500 Hanover Parkway

Suite 201

Greenbelt, Maryland 20770,

Neurological Medicine, P.A.

7500 Hanover Parkway

Suite 201

Greenbelt, Maryland 20770,

Respondents.

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Su v. Weaver, 313 Md. at 370, 545 A.2d at 697 (1988) 28

Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981) 19

Law Review Articles

J. MacAlister & A. Scanlan, Jr., Health Claims Arbitration in Maryland, The Experiment Has Failed, 14 U. Balt. L. Rev. 481, 501-02 (1985) 26

K. Quinn, The Health Care Malpractice Claims Statute: Maryland's Response To The Medical Malpractice Crisis, 10 U. Balt. L. Rev. 74, 93-94 (1980) . . . 26

CITATIONS OF OPINIONS AND JUDGMENT DELIVERED IN THE COURT BELOW

Crawford v. Leahy, 326 Md. 160, 604 A.2d 73 (1992)

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

The Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. §1257(a). As noted herein, however, no Federal question was raised or presented to the state court for consideration at any time and thus this Court lacks jurisdiction.

The opinion of the Court of Appeals of Maryland for which review is sought was entered on April 9, 1992.

The Petitioners' pro se Motion For Reconsideration was denied by the Court of Appeals of Maryland on May 8, 1992.

The Petitioners timely filed their Petition For Writ Of Certiorari pro se on August 6, 1992.

The Petition For Writ of Certiorari was received by the Respondents on August 6, 1992.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioners apparently contend that the Fourteenth Amendment to the United States Constitution, Section 1, is involved in their Petition For Writ Of Certiorari. This section provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

The Petitioners contend that §§ 3-2A-05 and 3-2A-06 of the Maryland Health Care Malpractice Claims Act [Maryland Courts and Judicial Proceedings Code Annotated, §§3-2A-05 and 3-2A-06 (1989, 1991 Cum. Supp.)] are involved in their Petition for Writ of Certiorari. These two sections, together with the Act's definitions, are set forth in the Appendix.

STATEMENT OF THE CASE

This case arises out of a medical malpractice claim asserted by the Petitioners, Helon D. Crawford and her husband, Alan Crawford, against the Respondents, William Leahy, M.D. and his professional association, Neurological Medicine, P.A. As required under Maryland law, the Petitioners' claim was originally arbitrated before a Health Claims Arbitration panel. Although the Petitioners obtained a Health Claims Arbitration award in their favor, they were dissatisfied with the amount of money awarded to them and sought judicial review of the award from the Circuit Court for Prince George's County, Maryland. However, in seeking their review of the arbitration panel's award, the Petitioners attempted to reject the arbitration award

only as it related to damages.[1] To accomplish this, the Petitioners filed a pleading entitled "Notice Of Action To Nullify Award As To Damages Only." In conjunction with this Notice, the Petitioners also filed a Complaint which alleged that Dr. Leahy had been negligent in his care and treatment of Mrs. Crawford, and which further demanded a jury trial "on all issues herein."

Dr. Leahy responded by immediately filing a "Motion To Strike Or, In The Alternative, For Complete Rejection Of The Arbitration Award," arguing that the

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[1] The award made by the Health Claims Arbitration panel was in the amount of $37,768.00 against Respondents. In the trial which followed the Petitioners' rejection of this award, the jury found that Dr. Leahy had not been negligent and awarded nothing to the Petitioners.

Petitioners' attempt to reject only the damages determination of the arbitration award was not authorized by the controlling state statute. The trial judge agreed, noting that there is "no authority to allow an appeal from Health Claims Arbitration on the issue of damages alone." [Petitioners' Brief, A-57]. In response to this ruling, the Petitioners amended their Nctice of Rejection and filed an "Amended Notice Of Action To Nullify Award," which rejected the award of the Health Claims Arbitration panel as it relates to liability and damages. They also refiled their Complaint which, as noted above, contained allegations of negligence against Dr. Leahy. Dr. Leahy answered the Amended Complaint by denying liability.

The Petitioners subsequently asked the trial judge to reconsider his decision

that once an award is rejected by either party, the case proceeds de novo on issues of both liability and damages. The trial judge denied Petitioners' request and, on January 28, 1991, the case proceeded to trial before a jury. In support of their case, the Petitioners presented evidence which included not only the arbitration award, but also expert testimony on the issue of Dr. Leahy's alleged negligence. At the end of trial, the jury returned a special verdict finding that Dr. Leahy was not negligent in his care and treatment of Mrs. Crawford.

The Petitioners then noted an appeal to the Court of Special Appeals of Maryland. By writ of certiorari, the Court of Appeals of Maryland took jurisdiction of the case to decide the proper scope of appeal from an Arbitration award under the Maryland Health Care

Malpractice Claims Act. On April 9, 1992, the Court held, in part, the following:

> In this case we are once more called upon to construe the Health Care Malpractice Claims Act, Maryland Code (1989, 1991 Cum. Supp.) 3-2A-01 through 3-2A-09 of the Courts and Judicial Proceedings Article (the "Act"). The narrow question presented is whether an award of the Health Claims Arbitration panel in favor of the Claimant on the merits can be subdivided into an award finding liability and an award assessing damages, permitting the Claimant to seek judicial review of only the amount of damages awarded. We shall answer that question in

the negative and affirm the judgement of the trial court.

[Petitioners' Brief, A-5].

The Court of Appeals of Maryland explained its decision by analyzing the statutory language and noting the absence of any case law permitting rejection of only the damage determination of an arbitration award, and then wrote in conclusion:

> The trial court properly applied the Act and preserved all parties' rights to a judicial determination on liability and damages on the merits. This ruling not only satisfies justiciability and adversariness requirements, but also preserves and promotes the General Assembly's goal of establishing a reliable and economical system

for resolution of malpractice claims.

[Petitioners' Brief, pp. A-46. A-47].

The Petitioners then moved pro se for reconsideration, and this was denied by the Court of Appeals of Maryland on May 8, 1992. Within the ninety days permitted by Supreme Court Rule 13, the Petitioners filed pro se the instant Petition For Writ Of Certiorari to the Court of Appeals of Maryland. The Respondents now file their Brief in opposition thereto.[2]

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[2] In accord with Supreme Court Rule 15, the Respondents take issue with the following misstatements of fact contained in the Petition for Writ of Certiorari. First, there is no evidence whatsoever that Mrs. Crawford had "burns over her entire body" or suffered from "internal injuries." [Petitioners' Brief, p. 5]. Second, Dr. Leahy appropriately

diagnosed Mrs. Crawford as suffering from complex partial seizure disorder, and Dr. Fisher's alleged statements, as set forth on pages 6 and 7 of the Petitioners' Brief, were not introduced at trial and are not a part of the record in this case. In truth, Dr. Fisher authored a report, which was not made a part of the record, wherein he informed Mrs. Crawford that her case against Dr. Leahy "was not very strong." Third, Mrs. Crawford was never required at trial to defend herself. [Petitioners' Brief, p. 20]. In point of fact, as the plaintiff was the party rejecting the Arbitration award, the burden of proof was upon Mrs. Crawford to prove her case of medical malpractice. However, the trial court improperly instructed the jury that the burden of proof was upon Dr. Leahy to prove that he

SUMMARY OF THE ARGUMENT

1. The Petitioners' claim that the Maryland Health Care Malpractice Claims Act, as applied by the Court of Appeals of Maryland, is repugnant to Federal law because it contravenes a policy of the United States, was never raised in the state courts below and, therefore, is not properly before this Court for consideration.
2. This Honorable Court lacks jurisdiction over this matter because the Federal law purportedly invoked by Petitioners is not the Constitution, a treaty or statute of

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was not negligent. This turned out to be harmless error because, even under this heightened burden, the jury found that Dr. Leahy was not negligent.

the United States, but a public policy which is still evolving.

3. The Court of Appeals of Maryland correctly decided that judicial review of a Health Care Malpractice Claims Arbitration award must be on the award as a whole, rather than on its component parts of liability and damages, and this approach rationally achieves the legislative purpose of providing a reliable and less costly alternative to medical malpractice litigation.

ARGUMENT

(i) The Petitioners' Federal Question was Never Raised in the State Courts Below.

The principal reason that the Petition for Writ of Certiorari should be denied is that nowhere below, neither in the trial court nor in the Court of Appeals of Maryland, have the Petitioners raised the question now presented to this Court. Until now, Petitioners' appeal turned entirely upon how the judicial review section of the Maryland Health Care Malpractice Claims Act should be applied, not whether its application was repugnant to the Constitution, treaties or laws of the United States. This Court has long-required that, before a writ of certiorari will be issued, the state statute's

repugnancy to the Constitution, treaties or laws of the United States must be brought to the attention of the state court below. See Street v. New York, 394 U.S. 376, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969), on remand, 24 N.Y.2d 1026, 302 N.Y.S.2d 848, 250 N.E.2d 250 (1969); Raley v. Ohio, 360 U.S. 423, 3 L.Ed.2d 1344, 79 S.Ct. 1257 (1959). The record filed by a petitioner must clearly show that any claim raised under a Federal statute or the United States Constitution was presented to the state courts, and that the state courts were apprised of the nature and substance of the Federal claim at the time and in the manner required by state law. Webb v. Webb, 451 U.S. 493, 498-99, 68 L.Ed.2d 392, 398, 101 S.Ct. 1889, 1893-94 (1981).

This was never done in the Petitioners' case here.[3] Indeed, neither the Fourteenth Amendment nor any Federal statute, treaty, or even policy was mentioned to the trial court or to the Court of Appeals of Maryland. The Petitioners' question, having not been raised below, is not properly before this Court.

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[3] Set forth in the Appendix to this brief at page A-21 are the Question Presented and Argument captions contained in the Brief of Appellant filed by the Petitioners in the Court of Appeals of Maryland. In conjunction with the Opinions of the Court of Appeals of Maryland (Petitioners' Brief, pp. A-4 through A-47), these demonstrate that the Petitioners' alleged Federal question was not previously raised in the state court below.

(ii) The Court Lacks Jurisdiction to Hear the Petitioners' Claim that the Maryland Health Care Malpractice Claims Act is Repugnant to a Policy of the United States.

Section 1257(a) of the United States Code [28 U.S.C. §1257(a)] provides that:

> Final judgments and decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, . . .

The Petitioners suggest in their brief that the judgment of the Court of Appeals of Maryland "unfairly threatens the goal of Federal uniformity in providing quality health care for all Americans." [Petitioners' Brief, p. 39.] In support of this contention, the Petitioners cite only the President of the United States' express concern that significant portions of the population do not have access to quality health care, his Health Care Liability Reform And Quality Of Care Improvement Act of 1991, which was presented to Congress on May 15, 1991, and the Health Care Quality Improvement Act of 1986 [42 U.S.C. 11101, et seq.]. Significantly, the 1986 Act addresses only professional peer review and expressly states that "[n]othing in this title shall be construed as affecting in any manner the rights and remedies

afforded patients under any provision of Federal or state law to seek redress for any harm or injury suffered as a result of" a health care provider's negligence. Moreover, the 1991 bill has yet to be acted upon by Congress. Clearly, the policy of the United States toward health care is far from decided, as seen in the debate of the current presidential campaign.

Notwithstanding the Petitioners' view, a state court's decision which may be contrary to the President's ideas or proposed legislation does not fall within this Court's jurisdiction. Simply stated, there has been no showing that any law or policy of the United States has been so violated by the decision of the Court of Appeals of Maryland as to warrant an exercise of this Court's jurisdiction pursuant to 28 U.S.C. 1257(a).

While this Court may consider the validity of a state statute drawn into question on grounds that it is repugnant to the Constitution, treaties or laws of the United States, repugnancy to an evolving Federal policy is not such a grounds. Accordingly, it is respectfully submitted that this Court lacks jurisdiction to hear the Petitioners' claim. The national health care concerns raised by the Petitioners as a basis for jurisdiction are very much premature. For the present time, policies to address medical malpractice claims are best left in the hands of the states.

(iii) The Decision of the Court of Appeals of Maryland was Correct and Fair to the Petitioners.

The Court of Appeals of Maryland gave careful consideration to the Petitioners' contention that judicial review of the entire arbitration award (liability and damages) increases the costs and amount of litigation necessary to deal with medical malpractice claims. After this consideration, the Court of Appeals of Maryland disagreed with the Petitioners and reached precisely the opposite result:

> When adopted, the Act was intended to hasten determination of medical malpractice claims, resulting in an improved system of justice. In adopting the Act, the Legislature clearly

anticipated that cost and time savings would result if parties frequently accepted the panel determination, either as the final decision or as the basis for payment. See, K. Quinn, The Health Care Malpractice Claims Statute: Maryland's Response To The Medical Malpractice Crisis, 10 U. Balt. L. Rev. 74, 93-94 (1980). The Act's presumption that the arbitration award is correct is specifically intended to deter rejection of panel decisions. See 3-2A-06(d); J. MacAlister & A. Scanlan, Jr., Health Claims Arbitration in Maryland, The Experiment has Failed, 14 U. Balt. L. Rev. 481, 501-02 (1985).

Permitting rejection of damages alone, however, would have the opposite effect. If a plaintiff may reject only the damage portion of the award, then defendants will likely reject every panel determination of their liability. If rejection becomes a matter of course, and court action routine, there is no prospect of achieving the Act's fundamental purpose of more economical justice.

* * *

If the claimant is permitted to reject only damages, however, the incentive to accept the amount of the arbitration award is dramatically diminished, given

that at trial, liability would be a certainty, and not merely presumed correct. Thus, "the Rule urged by [the Crawfords] encourages resort to the courts by providing a claimant with an unfair advantage." Su v. Weaver, 313 Md. at 381, 545 A.2d at 697. With no risk of an adverse jury verdict on liability, rejection of damages by the claimant becomes a certainty and settlement resulting from the arbitration award a rarity. These consequences defeat the primary purpose of the Act: to reduce costs by creating a reliable and acceptable alternative to a medical malpractice action in court.

[Petitioners' Brief, pp. A-42 through A-46.]

Thus, not only is there no Federal question involved, but the state statute at issue is one which rationally achieves its purpose of providing a reliable and less costly alternative to medical malpractice litigation. The statute is fair to claimants and health care providers alike. As the decision of the Court of Appeals of Maryland is both fair and correct, this Court should deny the Petitioners' Petition for Writ of Certiorari.

CONCLUSION

The Petitioners have raised no Federal question, and simply suggest that the Maryland Health Care Malpractice Claims Act is repugnant to the "health care" policy of the United States. Even if the contravention of this evolving policy was within the Court's jurisdiction, its consideration through this case would be grossly inadequate and premature. Moreover, the Petitioners did not raise their alleged Federal question for consideration by either the trial court or the Court of Appeals of Maryland and, accordingly, it is not properly before this Court. Finally, the Court of Appeals of Maryland gave full and careful consideration to the issues raised by the Petitioners and decided them fairly and correctly. For all these reasons, the

Respondents respectfully ask this Court to deny the Petition for Writ of Certiorari to the Court of Appeals of Maryland.

Respectfully submitted,

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APPENDIX

Sections 3-2A-01, 3-2A-05 and 3-2A-06 of the Maryland Health Care Malpractice Claims Act [Maryland Courts and Judicial Proceedings Code Annotated, §§ 3-2A-01, 3-2A-05 and 3-2A-06] are as follows:

§3-2A-01. - Definitions.

(a) **In general.** -- In this subtitle, the following terms have the meanings indicated unless the context of their use requires otherwise.

(b) **Arbitration panel.** -- "Arbitration panel" means the arbitrators selected to determine a health care malpractice claim in accordance with this subtitle.

(c) **Court.** -- "Court" means a circuit court for a county.

(d) **Director.** -- "Director" means the Director of the Health Claims Arbitration Office.

(e) **Health Care Provider.** -- "Health care provider" means a hospital, a related institution as defined in § 19-301 of the Health-General Article, a physician, an osteopath, an optometrist, a chiropractor, a registered or licensed practical nurse, a dentist, a podiatrist, a psychologist, a licensed certified social worker-clinical, and a physical therapist, licensed or authorized to provide one or more health care services in Maryland. "Health care provider" does not mean any nursing institution conducted by and for those who rely upon treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination.

(f) **Medical injury.** -- "Medical injury" means injury arising or resulting from the rendering or failure to render health care. (1990, ch. 357)

§ 3-2A-05. **Arbitration of claim.**

(a) **Issues to be referred by Director to panel chairman and panel.** -- (1) Except as provided under paragraph (2) of this subsection, all issues of law shall be referred by the Director to the panel chairman. All issues of fact shall be referred by the Director to the arbitration panel.

(2) Where a panel chairman has not been appointed or is temporarily unable to serve, and the Director is admitted to the Maryland Bar, the Director may rule on all issues of law arising prior to hearing that are not dispositive to the case and shall include the assessment of costs.

(b) **Application of other sections and Maryland Rules.** -- (1) The provisions of §§ 3-212 through 3-217 of this article

are applicable to proceedings under this subtitle.

(2) Except for the provisions of the Maryland Rules relating to time for the completion of discovery, the provisions of the Maryland Rules relating to discovery are applicable to proceedings under this subtitle. All discovery in any action under this subtitle shall be completed within 270 days from the date on which all defendants have been served, unless extended by the panel chairman for good cause shown.

(3) Properly authenticated hospital records and the records of treating health care providers are admissible without the necessity of calling the physician, subject to reasonable notice and the right of the opposing party to depose.

(c) **Chairman of panel.** -- The attorney member of the panel shall be chairman and he shall decide all prehearing procedures including issues relating to discovery and motions in limine. The chairman shall rule in camera on any motion in limine.

(d) **Testimony by additional experts.** -- A party may not present testimony from more than 2 experts in a designated specialty before an arbitration panel unless the panel chairman, for good cause shown, permits additional experts.

(e) **Determinations.** -- The arbitration panel shall first determine the issue of liability with respect to a claim referred to it. If the arbitration panel determines that the health care provider is not liable to the claimant or claimants the award shall be in favor of the health care provider. If the

arbitration panel determined that the health care provider is liable to the claimant or claimants, it shall then consider, itemize, assess, and apportion appropriate damages against one or more of the health care providers that it has found to be liable. The award shall itemize by category and amount any damages assessed for incurred medical expenses, rehabilitation costs, and loss of earnings. Damages assessed for any future expenses, costs, and losses shall be itemized separately.

(f) **Assessment of costs.** -- The award shall include an assessment of costs, including the arbitrators' fees. If there is no panel determination, the panel chairman shall assess costs.

(g) **Delivery of award to Director; service of copies.** -- The arbitration panel shall make its award and deliver it

to the Director in writing within 1 year from the date on which all defendants have been served and within 10 days after the close of the hearing. The Director shall cause a copy of it to be served on each party within 15 days of having received it from the arbitration panel.

(h) **Application for modification or correction; request for reduction of damages.** -- A party may apply to the arbitration panel to modify or correct an award as to liability, damages, or costs in accordance with § 3-222 of this article. The application may include a request that damages be reduced to the extent that the claimant has been or will be paid, reimbursed, or indemnified under statute, insurance, or contract for all or part of the damages assessed.

The panel chairman shall receive such evidence in support and opposition to

a request for reduction, including evidence of the cost to obtain such payment, reimbursement, or indemnity. After hearing the evidence in support and opposition to the request, the panel chairman may modify the award if satisfied that modification is supported by the evidence. The award may not be modified as to any sums paid or payable to a claimant under any workers' compensation act, criminal injuries compensation act, employee benefit plan established under a collective bargaining agreement between an employer and an employee or a group of employers and a group of employees that is subject to the provisions of the Federal Employee Retirement Income Security Act of 1974, program of the Department of Health and Mental Hygiene for which a right of subrogation exists under §§ 15-120 and 15-121.1 of the Health-General Article, or as

a benefit under any contract or policy of life insurance or Social Security Act of the United States. An award may not be modified as to any damages assessed for any future expenses, costs, and losses unless the panel chairman orders the defendant or the defendant's insurer to provide adequate security or, if the insurer is authorized to do business in this state, maintains reserves in compliance with rules of the Insurance Commissioner to assure the payment of all such future damages up to the amount by which the award has been modified as to such future damages in the event of termination. Except as expressly provided by Federal statute, no person may recover from the claimant or assert a claim of subrogation against a defendant for any sum included in the modification of an award. (1990, ch. 6, § 2.)

(i) **Confirmation of award.** -- Subject to § 3-2A-06 of this subtitle, the award of the panel shall be final and binding on the parties. After the time for either rejecting or modifying the award has expired the Director may, or, when requested by any party, shall file a copy of the award with the circuit court having proper venue, as provided in Title 6, Subtitle 2 of this article and the court shall confirm the award. Upon confirmation the award shall constitute a final judgment.

(j) **Authority to lengthen or shorten time limitation.** -- Except for time limitations pertaining to the filing of a claim or response, the Director or the panel chairman, for good cause shown, may lengthen or shorten the time limitations prescribed in subsections (b) and (g) of this section and § 3-2A-01 of this

article. (1976, ch. 235, § 1; 1981, ch. 552, 1985, ch. 104; 1986, ch. 640; 1987, ch. 596; 1988, ch. 291.)

§ 3-2A-06. **Judicial review.**

(a) **Rejection of award or assessment of costs.** -- A party may reject an award or the assessment of costs under an award for any reason. A notice of rejection must be filed with the Director and the arbitration panel and served on the other parties or their counsel within 30 days after the award is served upon the rejecting party, or, if a timely application for modification or correction has been filed within 10 days after a disposition of the application by the panel, whichever is greater.

(b) **Action to nullify award or assessment of costs.** -- (1) At or before the time specified in subsection (a) of this section for filing and serving a

notice of rejection, the party rejecting the award shall file an action in court to nullify the award or the assessment of costs under the award and shall file a copy of the action with the Director. Failure to file this action timely in court shall constitute a withdrawal of the notice of rejection. Subject to the provisions of subsection (c) of this section, the procedures applicable to the action including the form and necessary allegations in the initial pleadings shall be governed by the Maryland Rules. The Director need not be named a party to any action under this section.

(2) If any party to the proceeding elects to have the case tried by a jury in accordance with the Maryland Rules, it shall be tried by a jury. Otherwise, the case shall be tried by a judge.

(3) The trial date for each rejection of a panel determination shall have precedence over all cases except criminal matters and workers' compensation appeals.

(4) The clerk of the court in which an action is filed under this subsection shall forward a copy of the action to the State Board of Physician Quality Assurance.

(c) **Modification, correction, or vacation of award or assessment of costs by court.** -- An allegation by any party that an award or the assessment of costs under an award is improper because of any ground stated in § 3-223 (b) or § 3-224 (b) (1), (2), (3), or (4) or § 3-2A-05 (h) of this article shall be made by preliminary motion, and shall be determined by the court without a jury prior to trial. Failure to raise such a

defense by pretrial preliminary motion shall constitute a waiver of it. If the court finds that a condition stated in § 3-223 (b) exists, or that the award or the assessment of costs under an award was not appropriately modified in accordance with § 3-2A-05 (h) of this subtitle, it shall modify or correct the award or the assessment of costs under an award. If the rejecting party still desires to proceed with judicial review, the modified or corrected award shall be substituted for the original award. If the court finds that a condition stated in § 3-224 (b) (1), (2), (3), or (4) exists, it shall vacate the award, and trial of the case shall proceed as if there had been no award.

(d) **Admissibility of award; presumption of correctness.** -- Unless vacated by the court pursuant to

subsection (c), the unmodified arbitration award is admissible as evidence in the judicial proceeding. The award shall be presumed to be correct, and the burden is on the party rejecting it to prove that it is not correct.

(e) **Admissibility of depositions from arbitration proceedings.** -- (1) Depositions taken in the arbitration proceedings shall be as fully admissible as if noticed in court proceedings. Interrogatories and requests for admissions and production of documents in the arbitration proceedings remain binding in the court proceedings, subject to a duty of supplementation.

(2) The provisions of paragraph (1) of this subsection do not affect any rights to discovery on appeal.

(f) **Itemization of certain damages; remittitur.** -- Upon timely request, the

trier of fact shall by special verdict or special findings itemize by category and amount any damages assessed for incurred medical expenses, rehabilitation costs, and loss of earnings. Damages assessed for any future expenses, costs, and losses shall be itemized separately. If the verdict or findings include any amount for such expenses, costs, and losses, a party filing a motion for a new trial may object to the damages as excessive on the ground that the claimant has been or will be paid, reimbursed, or indemnified to the extent and subject to the limits stated in § 3-2A-05 (h) of this subtitle. The Court shall hold a hearing and receive evidence on the objection. If the court finds from the evidence that the damages are excessive on the grounds stated in § 3-2A-05 (h) of this subtitle, it may grant a new trial as to such damages or may deny a

new trial if the claimant agrees to a remittitur of the excess and the order required adequate security when warranted by the conditions stated in § 3-2A-05 (h) of this subtitle. In the event of a new trial granted under this subsection, evidence considered by the court in granting the remittitur shall be admissible if offered at the new trial and the jury shall be instructed to consider such evidence in reaching its verdict as to damages. Upon a determination of those damages at the new trial, no further objection to damages may be made exclusive of any party's right of appeal. Except as expressly provided by Federal law, no person may recover from the claimant or assert a claim of subrogation against a defendant for any sum included in a remittitur or awarded in a new trial on damages granted under this subsection.

Nothing in this subsection shall be construed to otherwise limit the common law grounds for remittitur.

(g) **Assessment of costs.** -- If the verdict of the trier of fact is not more favorable to the party that rejected the arbitration panel's award, than was the award, the costs of the judicial proceedings shall be assessed against the rejecting party. Otherwise, the court may determine the assessment of such costs. If the court vacates an assessment of arbitration costs, it shall reassess those costs as justice requires.

(h) **Venue.** -- Venue shall be determined in accordance with the provisions of § 6-201 of this article.

(i) **Filing copy of verdict or other final disposition with Director.** -- The clerk of the court shall file a copy of the verdict or any other final disposition

with the Director. (1976, ch. 235, § 1; 1977, ch. 265; 1979, ch. 156; 1981, ch. 588; 1986, ch. 640; 1987, ch. 596; 1988, ch. 109, § 7; ch. 160; 1989, ch. 5, § 1; 1991, ch. 21, § 3; ch. 25.)

Excerpts from Brief of Appellant filed by Petitioners in the Court of Appeals of Maryland.

QUESTION PRESENTED

Under the Maryland Health Claims Arbitration Act, can an award on the merits in favor of a claimant be segregated into an award finding liability and an award assessing damages, so that the claimant can obtain court review of the damages amount alone when the health care provider has not properly rejected the liability finding?

ARGUMENT

THE TRIAL COURT ERRONEOUSLY SUBMITTED THE ISSUE OF DR. LEAHY'S LIABILITY TO THE JURY.

A. The Arbitration Panel's Determination Is Comprised Of Multiple Awards.

B. Dr. Leahy Was Required To File A Notice Of Rejection And An Action To Nullify To Obtain Court Review Of The Panel's Liability Decision.

FILED
SEP 14 1992
OFFICE OF THE CLERK

No. 92-241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HELON D. CRAWFORD, *et al.*,
Petitioners,

V.

WILLIAM LEAHY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Court of Appeals of Maryland

REPLY TO BRIEF IN OPPOSITION

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&
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QUESTION PRESENTED

Subsequent to a medical negligence claim arbitrated pursuant to Maryland's Health Care Malpractice Claims Act, resulting in Mrs. Crawford's rejection of the damages determination only, did the Maryland Courts violate Mrs. Crawford's rights guaranteed to her by the United States Constitution, Fourteenth Amendment, Section 1 and/or adversely impact the goal of the Federal Government to solve the national health care crisis; by causing Mrs. Crawford to also seek judicial review of the unrejected determination of liabilty, even though there was no action in court to nullify the award as to liability, by any party?

LIST OF PARTIES TO THE PROCEEDING

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CONSTITUTIONAL PROVISIONS:

United States Constitution, Fourteenth Amendment, Sec. 1 . . . . . iii, 8, 9, 20

FEDERAL STATUTES:

Health Care Quality Improvement Act of 1986, title IV of Public Law 99-660 (the Federal Act) . . . 9, 10, 11, 15, 20

MARYLAND STATE STATUTES:

Maryland Code (1989, 1991 cum. supp.) 3-2A-01 through 3-2A-09 (the Act) . . . . . iii, 3, 4, 5, 7, 18

OTHER FEDERAL AUTHORITIES:

United States Department of Health, Education and Welfare, Report of the Secretary's Commission on Medical Malpractice 4 (1973) [the HEW Report] 2, 3

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THE QUESTION PRESENTED IS RIPE AND DOES MERIT REVIEW

Dr. Leahy and Neurological Medicine, P.A., (collectively Dr. Leahy), the Respondents, attempt through their "Brief In Opposition To Petition For Writ Of Certiorari", to diminish the authority of this Court and it's jurisdiction in matters that may threaten the goals of United States. See *Hanna v. Plumer*, Mass. 1965, 85 S.Ct. 1136, 380 U.S. 460, 14 L.Ed. 2d 8.

The Respondents suggest that while Federal policy is evolving, matters are best left in the hands of the States, while disregarding the Federal crisis at hand. In fact, it was the State of Marylands response to the medical malpractice crisis that evolved subsequent to and with the benefit of Federal initiatives.

The Respondents unfairly characterize the policy of the United States toward health care, as "far from decided, as seen in the debate of the current presidential campaign." (Page 23 of Respondents Brief).

Clearly, President Bush is not the first President to recognize the impact of medical malpractice upon the future of health care in this country and the profound consequences. See *U.S. Dep't of Health, Education and Welfare, Report of the Secretary's Commission on Medical Malpractice 4* (1973) [hereinafter cited as the HEW Report]. The creation of the Federal Commission by Presidential Order to study the problems of medical malpractice is ample evidence of a national concern that vitally affects the ways in which health care is rendered in this country.

The *HEW Report* of 1973 does indeed demonstrate that a Federal interest in Medical Malpractice preceded both the current political arena as well as the enactment of the *Maryland Health Care Malpractice Claims Act* (the *Act*).

Subsequent to the Federal initiative, the Maryland legislature attempted to reform tort laws in order to reduce the expense and time required to litigate medical malpractice claims, by enacting the *Act* but the decision of the Court of Appeals of Maryland in this case, prevents the *Act* from achieving its purpose by reforming tort laws. Citing *B.N. v. K.K.*, 312 Md. 135, 141, 538 A.2d 1175, 1178 (1988) "One of the fundamental principles of tort law is that damages are an integral part of liability" (See decision at page A.36 of the Appendix provided in Petition), the Court of

Appeals of Maryland effectively denied the Maryland legislature the ability to reform tort laws in the public interest as the *Act* provided. Yet the Court of Appeals had previously agreed with other State and Federal Courts that "there is no vested interest in any rule of the common law, *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 134, 24 L.Ed. 77 (1987), so that the common law 'may be abbrogated or changed as the General Assembly may think most conducive to the general welfare'", see *Attorney General v. Johnson*, 282 Md. 168, 385 A.2d 57, 71. The *Act* however, does not divest liability from damages, but merely provides an alternative mechanism to resolve issues in dispute under which the Petitioners met their burden of proving liabilty against Dr. Leahy and Neurological Medicine, P.A.

Absolutely nowhere in the *Act*, is there any mention of de novo review by the courts or any language that mandates that the Courts must review all the determinations of an arbitration panel or none at all. Clearly, the Maryland legislature recognizes the ability of a Court of law to fairly itemize damages or reach a conclusion for any rejected arbitration determination, without compelling the Courts to also decide unrejected arbitration determinations resolved by the *Act*. It is unreasonable to assume that a Court of law would necessarily increase an arbitration determination of damages only because the determination of liabilty was already resolved through the alternative mechanism of arbitration. To the contrary, the Courts could very well reduce the amount of damages.

Increased litigation costs and the time required of the Courts however, are a certainty if judicial review is also required for determinations that have been resolved through arbitration and can only serve to compound the Federal health care crisis.

Notwithstanding, the discretion of this Court to grant the petition for writ of certiorari based on the special and important reasons presented by the Petitioners, the Respondents ignore that Mrs. Crawford also relied on and filed with the trial court, a summary of case laws, in support of her position (See pages 51-52 of petition). Even though Mrs. Crawford did not succeed in convincing the trial court, the trial court clearly departed from the decision of the United States Court of Appeals in *Lipscomb v. Memorial Hospital, et al*, 733

F. Supp. 2nd 332 (4th Cir. 1984), by improperly shifting the burden of proof requirements, thus preventing Mrs. Crawford from having a fair trial. Mrs. Crawford also provided the Court of Appeals of Maryland with a copy of the case law summary which had been filed with the trial court.

Additionally, 10 days before trial in the instant case, the Court of Appeals of Maryland issued a decision in the "*Gettes*" case (See *Central Collection v. Gettes*, 321 Md. 671, 584 A.2d 689) in which the Court of Appeals of Maryland reserved unto itself, until another day, resolution of the question as to whether an award on the merits could be subdivided into awards of liabilty and damages under the Act. This left Mrs. Crawford standing before the trial court, facing the prospect that the Court of

Appeals of Maryland had effectively become both the State court of first resort and last resort for Mrs. Crawford, while having to first defend the liability determination in trial court. Additionally, the procedural error of the burden of proof requirements, virtually assured a reversal of the liability determination against Dr. Leahy.

Ultimately, when Mrs. Crawford was afforded the opportunity to present her question to the Court of Appeals of Maryland, that Court denied Mrs. Crawford equal protection under the laws and rendered a decision that threatens the ability of the Federal Government to assure that affordable, quality health care remains available to the population of this country. The Fourteenth Amendment to the United States Constitution, Section 1,

was violated when the Court of Appeals of Maryland failed to provide Mrs. Crawford equal protection under the law and as further explained in the Petition for Writ of Certiorari before this Court.

The Respondents also attempt to dismiss the *Health Care Quality Improvement Act of 1986* [42 U.S.C. 11101, et seq.], as only pertaining to professional peer review (hereinafter the *Federal Act*). While the *Federal Act* does address professional peer review under Part "A", the Respondents ignore the other significant provisions contained in Part "B" of the *Federal Act*.

Significantly, the *Federal Act* establishes a National Practitioner Data Bank for Adverse information on Physicians and Other Health Care Practitioners, for which the final

regulations were published in the *Federal Register* on October 17, 1989; Vol. 54, No. 199 as administered through the Department of Health and Human Services. The Federal Data Bank is required because "There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure of the physician's previous damaging or incompetent performance." (Sec. 402(2) of the *Federal Act*) and because "The occurence of medical malpractice and the need to improve the quality of care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State." (Sec. 402(1) of the *Federal Act*).

The Maryland Courts however, circumvent the reporting requirements of the *Federal Act* by causing judicial review of an unrejected liability finding not before

the Courts that would otherwise be reported in compliance with the *Federal Act*. Thus, even though Dr. Leahy did not reject the liability finding against him, the Maryland Courts deprived the Federal Government and each State, knowledge of Dr. Leahy's negligence as was determined by the Arbitration Panel.

It is ironic and unfair that the respondents contend that the Petitioners never raised the Federal Question in the Courts below, where Dr. Leahy successfully concealed from Mrs. Crawford and the Courts, information pertaining to any past medical negligence claims. Dr. Leahy's denial that he or Neurological Medicine, P.A., had ever been named in a medical negligence case, clearly demonstrates why the *Federal Act* was necessary. Furthermore, by granting the Petition For Writ Of Certiorari To The

Court of Appeals of Maryland, this Court may determine whether or not the Maryland Courts improperly reviewed the liabilty finding against Dr. Leahy, and if so, Dr. Leahy's liabilty would consequently be reported to the National Practitioner Data Bank, preventing Dr. Leahy from failing to disclose the information relevant to the liability finding against him in the future.

Mrs. Crawford is only able to provide this Court with the information of which she has discovered through her own efforts and those of her husband, regarding evidence that Dr. Leahy provided her with false answers to interrogatories and she does not know if there is more evidence or not. But Mrs. Crawford has found that Dr. Leahy's attorney, Mr. Mark D. Gately (Counsel of Record), who provided service of Dr.

Leahy's answers to interrogatories to Mrs. Crawford, also had previously represented another physician, Dr. Cantor, who is also a member of Neurological Medicine, P.A., practicing with Dr. Leahy. More specifically, Mrs. Crawford has discovered a letter by Mr. Mark D. Gately addressed to the Health Claims Arbitration Office on December 9, 1985 accompanied by a Miles & Stockbridge check for payment of costs attributed to Dr. Cantor, one of the defendants in HCA Case No. 83-150. In that letter, Mr. Gately expresses thanks for the customary cooperation. Although HCA Case No. 83-150 did not name the professional association of Neurological Medicine, P.A. as a defendant, concurrently HCA Case No. 84-265 was before the Health Claims Arbitration Office also and did name both

Neurological Medicine, P.A. and William R. Leahy, M.D. as defendants in that case. Although Mrs. Crawford has found other medical negligence claims that were filed against other physicians who belong to the small practice of Neurological Medicine, P.A., it is inexcusable that Dr. Leahy denied to Mrs. Crawford that neither he or Neurological Medicine, P.A. had ever been named in a medical negligence suit when in fact both had. Additionally, as explained in the Petition before this Court, it is equally inexcusable and an obstruction of the justice system, that during the trial in this instant case, Dr. Leahy's other attorney, Mr. Neal Brown, also of the law firm of Miles and Stockbridge, informed the jury that this was the first time Dr. Leahy had to go through something like this, while Dr. Leahy

continued to conceal from Mrs. Crawford and the Courts, information relevant to past medical negligent claims.

Having successfully witheld this information from Mrs. Crawford during the Arbitration proceedings and the subsequent judicial review in the Maryland Courts, the Respondents now argue before the Supreme Court Of The United States, that Mrs. Crawford failed to raise a Federal question in the State Courts. Clearly however, this case presents squarely, issues that should be reviewed by this Court and demonstrates the applicability of the Federal Act, which should prevent Dr. Leahy from concealing the Arbitration determination of liabilty against him.

At page 14, footnote 2, of the Respondents Brief, issue was taken with alleged misstatements of fact contained

in the Petition for Writ of Certiorari. The referenced report authored by Dr. Fisher, was a letter to Mrs. Crawford, dated September 18, 1986 and made no mention of a case against Dr. Leahy as the Respondents describe. This Court should notice how the Respondents, by slight of hand, carefully refrained from including Dr. Leahy's name within their quotation. Infact, it was not until December of 1986 that Dr. Fisher of Johns Hopkins hospital completed the duplication of testing on Mrs. Crawford, that had been performed previously by Dr. Leahy. Thus any speculation as to whether a case against Dr. Leahy was strong or not, would have been premature and furthermore as explained in the petition, Dr. Fisher had previously expressed concern to Mrs. Crawford about a potential case against the drug

manufacturer. It is therefore unfair for the Respondents to interject Dr. Leahy's name into a report by assumption.

Only in December of 1986 was Dr. Fisher able to provide Mrs. Crawford with the results of her testing which determined that Mrs. Crawford did not have a seizure disorder, results which were confirmed independently by two other physicians at Johns Hopkins Hospital, at Dr. Fishers request.

Dr. Leahy however, prevented Mrs. Crawford from introducing her health care records from Dr. Fisher and Johns Hopkins Hospital as evidence during the trial in the Circuit Court for Prince Georges County, Maryland, by convincing Associate Judge James P. Salmon that Mrs. Crawfords health care records from Dr. Fisher were not admissible. This tactic was an attempt by Dr. Leahy to drive up the

the litigation costs and discourage Mrs. Crawford from pursuing her claim.

Clearly the Maryland legislature recognizes the harm of this often used tactic and provided a solution in the *ACT* under 3-2A-05(a)(3) which provides:

> "Properly authenticated hospital records and the records of treating health care providers are admissable without the necessity of calling the physician, subject to reasonable notice and the right of the opposing party to depose."

Additionally, the Respondents contend that there is no evidence whatsoever that Mrs. Crawford had "burns over her entire body or suffered from internal injuries". The evidence is crystal clear however, that Mrs. Crawford suffered a toxic reaction to the drug tegretol which was

prescribed by Dr. Leahy for a seizure disorder, that Mrs. Crawford subsequently learned was wrong.

There are three medical terms that describe the toxic reaction Mrs. Crawford suffered: 1) Stevens-Johnson syndrome

2) Toxic Epidermal Necrolysis

3) Erythema Multiforme

Among the evidence admitted to the Arbitration Panel, The Circuit Court for Prince George's County, Maryland and the Court of Appeals of Maryland are extensive photo exhibits of Mrs. Crawford which vividly show the damages to her body during her hospitalization and subsequent recovery. The credibility of the Respondents assertions could well be dispelled by this Court, upon an examination of the evidence and exhibits in this case.

CONCLUSION

The decision by the Court of Appeals of Maryland not only deprived Mrs. Crawford of her rights under the United States Constitution as provided in the Fourteenth Amendment, Section 1, but the State decision also conflicts with Federal case law, a Federal Act, and the goals of the Federal Government as well.

Petitioners respectfully ask this Court to grant the Petition for Writ of Certiorari to the Court of Appeals of Maryland for the special and important reasons presented therein.

Respectfully submitted,

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